Calendar No. 835

99TH CONGRESS
2d Session

SENATE

REPORT
99-402

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION REGULATIONS GOVERNING PRESERVATION, PROTECTION OF, AND PUBLIC ACCESS TO NIXON ADMINISTRATION PRESIDENTIAL MATERIALS MEET STATUTORY TEST AND SHOULD BE IMPLEMENTED

AUGUST 13 (legislative day, AUGUST 11, 1986.—Ordered to be printed

---

Mr. ROTH, from the Committee on Governmental Affairs, submitted the following

REPORT

[To accompany S. Res. 478]

The Committee having had under consideration an original resolution agrees to report favorably thereon and recommends that the resolution do pass.

PURPOSE OF THE RESOLUTION

The purpose of the resolution is to express the sense of the Senate that regulations issued by the National Archives and Records Administration governing the preservation, protection of, and public access to the Nixon Administration Presidential Materials meet the statutory requirements of The Presidential Recordings and Materials Preservation Act of 1974 and should be implemented without regard to an interpretive memorandum by the Department of Justice Office of Legal Counsel dated February 18, 1986, dealing with executive privilege claims of former President Nixon.

BACKGROUND

On June 26, 1986, regulations proposed by the National Archives and Records Administration (NARA) regarding the Presidential Materials of former President Richard M. Nixon became effective.

The proposed regulations were submitted by NARA to OMB on December 4, 1984, for regulatory review pursuant to Executive Order 12291. OMB, by letter dated December 11, 1984, to the National Archives extended its 10 day review period and completed its review without change on March 19, 1985.

The proposed rules were published in The Federal Register on March 29, 1985. During the 60 day public comment period, com-

71-008 O

S403-10

ments were received on behalf of former President Nixon, former Nixon staff members, the former Secretary of State, and NBC News.

NARA submitted its draft final rules to OMB on July 11, 1985. The Department of Justice by letter dated July 19, 1985, informed NARA it had no substantive changes to recommend.

But OMB, by letter dated July 23, 1985, to NARA extended its 10 day review period. OMB took no action on NARA's proposed final rules and provided no adverse comments during the comment period.

On December 18, 1985, suit was filed against OMB and the National Archives alleging unreasonable delay in the promulgation of these regulations.

On February 6, 1986, OMB wrote the Department of Justice requesting the views of the Office of Legal Counsel as to whether the proposed regulations met one of the seven criteria (Sec. 104(a)(5)) of The Presidential Recordings and Materials Preservation Act of 1974 (PRMPA—P.L. 93-526, 44 USC 2111 note) which mandated the regulations.

On February 18, 1986, The Office of Legal Counsel of the Department of Justice responded to OMB interpreting the PRMPA and the regulations to require, among other things, the Archivist to honor claims of executive privilege by former President Nixon (Appendix A).

On February 21, 1986, OMB wrote to NARA, enclosing the DOJ interpretive memorandum, stating the proposed regulations were consistent with Executive Order 12291 provided NARA interpreted the regulations according to the Office of Legal Counsel memorandum.

On February 26, 1986, NARA transmitted the proposed final regulations to the House and Senate for a 60 day review period. NARA also enclosed the interpretive memorandum of the DOJ Office of Legal Counsel to OMB with the proposed final rules. The rules took effect on June 26, 1986.

The regulations

The regulations establish a process for the archival processing, screening, public notice and notification to Mr. Nixon and former members of his White House staff relating to the Presidential Materials of former President Nixon.

The regulations were promulgated pursuant to The Presidential Recordings and Materials Preservation Act of 1974 (PRMPA) enacted by Congress in the wake of Watergate and in response to the Nixon-Sampson agreement which would have permitted the former President exclusive control over the records of his Presidency. The Act invalidated the Nixon-Sampson agreement and placed the Nixon materials in the custody of the U.S. government. The PRMPA governs only the Presidential materials of former President Nixon.

The regulations detail procedures for NARA archivists to review, segregate and determine those Nixon Presidential materials of a private or personal nature, those materials not related to abuses of governmental power, and those materials not of general historical significance which are to be returned to Mr. Nixon. They also pro-

vide for restriction of Nixon Presidential materials paralleling certain restrictions in The Freedom of Information Act (i.e. to protect trade secrets; protect personal privacy; protect law enforcement investigatory personnel, materials, sources, and techniques; and protect properly classified material).

They establish a Senior Archival Panel to determine difficult questions of classifying, restricting, or otherwise treating certain documents, including questions of far-reaching precedent. A five-member Presidential Materials Review Board is also created to hear and decide the most sensitive issues regarding proper categorization and disposition of Nixon Presidential materials.

Volume and type of materials

The Nixon materials in the custody of the United States government comprise 42 million pages of papers; 950 "White House" tapes; 4,100 tapes or other sound recordings; 4,000 video tapes; 1.2 million feet of motion picture film; 435,000 still photographs; 15,000 books; and 25,000 "museum objects", including gifts to the former President by other heads of state and by citizens. NARA estimates that approximately 35,000 cubic feet of those materials related to the Nixon Presidency.

The materials include special and central files of the Office of the White House, staff members, and the National Security Council; 240 exit interviews of White House staff; federal records of the Office of Presidential Materials; task forces, boards, committees, and commissions which reported directly to the President; records of the 1968 Nixon-Agnew Campaign Committee; records of the Committee to Reelect the President (1971–72); records of the Watergate Special Prosecutor project (1974–75); audio visual materials of the White House Communications Agency; audio tapes made in the White House and Communications Agency; audio tapes made in the White House and Camp David; and sundry foreign and domestic gifts to the former President.

Statutory requirements

Sec. 105 of the PRMPA required seven interests to be taken into account by the Archivist of the U.S. in proposing regulations that would protect, preserve, and provide public access to the Presidential historical materials of former President Nixon.

> (1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term 'Watergate';
>
> (2) the need to make such recordings and materials available for use in judicial proceedings;
>
> (3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings to information relating to the Nation's security;
>
> (4) the need to protect every individual's right to a fair and impartial trial;
>
> (5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege

which would prevent or otherwise limit access to such recordings and materials;

(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and

(7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

Section 105 (a) of that Act vested the U.S. District Court for the District of Columbia with exclusive jurisdiction to hear any challenge to the validity of any regulation regarding the Nixon records.

The National Archives and Records Administration Act of 1984 (Public Law 98-497), known as the Archives "independence" Act, separated the Archives from the General Services Administration and reestablished it as an independent agency of government. The law made the position of Archivist a professional non-partisan Presidential appointment subject to Senate confirmation with no fixed term of office.

The purpose and intent of this law was to increase the stature of the position of Archivist as the trustee of federal government records of permanent historic value and to insulate decision-making by the Archivist from political pressure by removing the position from reporting to a political appointee, the GSA Administrator.

The Presidential Records Act of 1978 (Public Law 95-591) established the public ownership of records created by future Presidents and their staffs in the course of discharging their official duties. The Act established procedures governing the preservation and public access to such records within 12 years after the end of a Presidential administration. The Act terminated the tradition of private ownership of Presidential papers and reliance on voluntary donation of papers by former Presidents to the National Archives. The Act will first apply to the Presidential papers of President Reagan.

History of litigation

This is the sixth set of regulations proposed by NARA to implement the PRMPA since 1975. Previous proposed regulations were disapproved by Congress or invalidated by U.S. District Court because they had been subjected to an invalid one-house legislative veto provision.

Nixon v. *Administrator of General Services* (1977): In this challenge to the constitutionality of the PRMPA, the Supreme Court upheld the facial constitutionality of the law in a 7-2 decision. The court acknowledged that a former President may assert a claim of executive privilege over his Presidential materials. However, the court noted that the incumbent President and his subordinates were not obligated to support or accept the former President's claim that the Act violated the separation of powers clause and executive privilege. The court noted that the incumbent President

and his subordinates were in the "best position to assess the present and future needs to the Executive Branch." The Court also stated that the privilege asserted by a former President is not a fixed and permanent one, but erodes with the passage of time.

Nixon v. *Solomon* (1977): In this suit Mr. Nixon challenged proposed regulations by the Archives on constitutional grounds. The suit was settled in 1979 between Mr. Nixon, the Administrator of GSA (Archives), and third party intervenors. The parties agreed to public access regulations and screening procedures, except for two issues discussed below in *Nixon* v. *Freeman.*

Nixon v. *Freeman* (1982): This D.C. Circuit Court of Appeal's decision reaffirmed the settlement in *Nixon* v. *Solomon,* and rejected the former President's challenge to Archives' proposed regulations providing public access to White House tape recordings and screening procedures for Mr. Nixon's personal diary.

The court, in upholding the settlement in *Nixon* v. *Solomon,* stressed that no materials would be made public "until Mr. Nixon . . . (has) had an opportunity to object to disclosure and obtain judicial review of any adverse determination." The court affirmed that the regulations provide Mr. Nixon the opportunity to challenge any proposed disclosure on the basis of executive privilege.

Allen et al. v. *Carmen* (1983): This D.C. District Court decision invalidated the fifth set of NARA proposed regulations because they were subjected to an unconstitutional one-house legislative veto. The National Archives and Records Administration Act of 1984 cured this defect by converting the one-house veto to a 60 legislative day "report and wait" provision.

Public Citizen v. *National Archives and Records Administration* (June 26, 1986): This suit pending before the D.C. District Court seeks an order directing the Archives to implement its Nixon regulations to provide public access without regard to the DOJ Office of Legal Counsel memorandum or directives from OMB to comply with such memorandum.

Congressional response to proposed final regulations

On April 29, 1986, the House Subcommittee on Government information, Justice, and Agriculture held a hearing on the substance of the Office of Legal Counsel memorandum, the events leading up to it, and the role of OMB and DOJ in this particular rule-making process. This memorandum states that the Archivist has no discertion to pass judgment on the validity of a claim of executive privilege asserted by a former President.

The Subcommittee heard testimony that the DOJ Office of Legal Counsel interpretive memorandum contradicts the plain language of the proposed regulations, Congressional intent in both the PRMPA and the Archives "independence" law, and poses a potential precedent for the treatment by NARA of the papers of future Presidents, including the incumbent, which could effectively delay or foreclose entirely public access to the records of former Presidents. (See Appendix B-Congressional Research Service Critique of DOJ Office of Legal Counsel Memorandum).

The Senate Subcommittee on Governmental Efficiency and the District of Columbia decided to forego a hearing on the matter believing much of the testimony would be repetitive of that presented

to the House Subcommittee. In lieu of a hearing the Subcommittee Chairman and Ranking Minority member submitted a joint statement to the House Subcommittee taking exception to the views put forth by the DOJ Office of Legal Counsel.

On April 22, 1986, Senators Mathias, Eagleton, and Chiles requested a review and analysis by the General Accounting Office of the interpretive memorandum. On June 10, 1986, the GAO responded, finding the conclusions of the memorandum to be "inconsistent with the Archivist's regulations and contrary to his statutory responsibilities under the 1974 Act."

The GAO analysis stated that the conclusion was at odds with past practices under the PRMPA, noting, "on several occasions the Archivist, with the support of the Justice Department, has reviewed and evaluated claims of executive privilege asserted by Mr. Nixon, and has rejected many of Mr. Nixon's claims."

Lastly, GAO stated the conclusions of the memorandum "call(s) into question whether the Justice Department will permit the Archivist to exercise fully his responsibilities under The Presidential Records Act of 1978 with respect to the materials of future ex-Presidents." The GAO analysis is included as Appendix C.

Given the long history of litigation concerning access to the Presidential materials of former President Nixon and the confusion and uncertainty created by the existence of the Justice Department Office of legal Counsel memorandum to OMB, the Committee feels compelled to restate Congressional intent.

The Committee does so with full knowledge that the federal judiciary has been inconsistent in its treatment of legislative history, particulary that following enactment of the legislation. On the one hand, the Supreme Court has said that post-enactment legislative history is immaterial.[1] On the other, the Supreme Court has said that Congress' failures to make post-enactment legislative history contradicting questioned executive-branch enforcement of a law should be read as acquiescence in the manner of enforcement.[2]

Lest anyone relying on the latter line of cases infer from the silence of this Committee that it concurs in the argument of the Office of Legal Counsel that former President Nixon's claim of executive privilege conclusively binds the Archivist, the Committee hereby states its disagreement and recommends that the Senate adopt the reported resolution to that effect.

The Committee does not intend, by reporting the resolution to the Senate, to suggest that in the future it will routinely comment regarding the promulgation of rules on matters within its jurisdiction.

Nor should anyone infer when future questions arise that Committee silence is acquiescence. There are many reasons why Congress does not respond to every legal question arising from enforcement of its enactments; agreement with the executive branch is but one possibility. Congress is not under any obligation, constitutional or otherwise, to address every such legal question or even to address those where it disagrees.

---

[1] E.g., *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977).
[2] E.g., *North Haven Board of Education* v. *Bell*, 456 U.S. 512 (1982).

It is the view of the Committee on Governmental Affairs that the final regulations issued by the National Archives and Records Administration on February 26, 1986, and effective as of June 26, 1986, meet the statutory requirements of the PRMPA. It is the Committee's view that the regulations balance the several interests involved, including those of former President Nixon as well as the public interest, in protecting, preserving, and providing public access to the Nixon Administration Presidential Materials.

August 9, 1986, marks the twelfth year since the end of the Nixon Presidency. Researchers, scholars, and the American public have been denied access to materials which would help them learn about this important era in their history and in the workings of their government. And the Committee is confident that the judicial review permitted of decisions by the Archivist with respect to access assures fair and impartial decisions in the best interests of the United States.

The basic purposes of the PRMPA were to preserve, protect, and provide public access to the Nixon Presidential materials. The interpretive memorandum of the Office of Legal Counsel says, among other things, that the Archivist would be required to accept without challenge any claim of executive privilege asserted by former President Nixon. That interpretation undermines the basic purposes of the Act. The Committee believes that the Archivist is required to exercise his own judgment regarding Richard Nixon's arguments opposing access to his records on any grounds asserted, including that of executive privilege of a former President. Therefore, the Committee concludes that the regulations should take effect and be implemented without regard to the interpretive memorandum of the Office of Legal Counsel so that the process of public access to the documents and materials of the Nixon Presidency can begin as Congress intended.

APPENDIX A

National Archives

Washington, DC 20408

FEB 26 1986

Honorable George Bush
President of the Senate
Washington, DC 20510

Dear Mr. President:

Pursuant to the Presidential Recordings and Materials Preservation Act of 1974 (Pub. L. 93-526), Section 104, as amended by Section 107 of the National Archives and Records Administration Act of 1984 (Pub. L. 98-497), I am pleased to report the final set of regulations governing access to the Nixon Presidential materials. This is the sixth set of Nixon Presidential materials access regulations. This set replaces the regulations that were ruled unconstitutional on December 30, 1983, by the United States District Court for the District of Columbia.

On March 29, 1985, the National Archives published proposed regulations. After considering several comments in response to this proposal, we are now issuing the regulations as a final rule. For your convenience, I have also enclosed a copy of the proposed set because it has a preamble that provides the historical background to the final set of regulations. The enclosed legal memorandum from the Department of Justice to the Office of Management and Budget interprets certain provisions in the regulations.

I will be happy to discuss this report with you at any time.

Sincerely,

Frank G. Burke

FRANK G. BURKE
Acting Archivist
of the United States
(202)523-3132

Enclosures

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

FEB 21 1986

Honorable Frank Burke
Acting Archivist of the United States
National Archives and Records Service
General Services Administration
Washington, D.C. 20408

Dear Mr. Burke:

Pursuant to Executive Order No. 12291, the Archives submitted for review a final regulation implementing the Presidential Recordings and Materials Preservation Act of 1974.

The purpose of this letter is to inform you that we have concluded our review and believe that the rule as submitted for our review, and as interpreted in the enclosed memorandum from the Office of Legal Counsel in the Department of Justice, is consistent with Executive Order No. 12291.

Sincerely,

Robert P. Bedell
Deputy Administrator
Office of Information and
Regulatory Affairs

Enclosure

U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

FEB 18 1986

MEMORANDUM FOR ROBERT P. BEDELL
Deputy Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

RE: Nixon Papers Regulations

The National Archives and Records Administration (NARA) has recently proposed final rules to govern the preservation and protection of, and public access to, the presidential materials of the Nixon Administration. These rules would implement the Presidential Recordings and Materials Preservation Act of 1974, Pub. L. No. 93-526, 88 Stat. 1695, 44 U.S.C. 2111 note (PRMPA), which directed the Administrator of General Services to take custody of the presidential papers and tape recordings of former President Nixon and to supervise the processing, screening, and preparation of those materials for public access. NARA, which has succeeded to those functions under the National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, 98 Stat. 2280, published the proposed rules for public comment last spring, 50 Fed. Reg. 12575 (Mar. 29, 1985), and subsequently transmitted them to the Office of Management and Budget (OMB) for review under Executive Order No. 12291. The proposed rules are the latest in a series of proposals that have either been vetoed by Congress, withdrawn because of congressional opposition or litigation, or struck down by the courts.

You have asked that this Office review the proposed regulations to determine whether they meet the statutory mandate of PRMPA to "protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials."[1] As we discuss below, we believe the proposed regulations are adequate to meet that standard, so long as they are interpreted and administered as set forth in this opinion.

---

[1] Section 104(a)(5).

I. BACKGROUND

A. Nixon-Sampson Agreement

When President Nixon resigned in 1974, a large quantity of documents, files, and other materials accumulated by him and his staff remained in the government's custody.[2] While government archivists were collecting these materials for shipment to California in accordance with the former President's instructions, President Ford asked Attorney General Saxbe for advice about their ownership. The Attorney General concluded that the materials were owned by President Nixon but recognized that the materials were "peculiarly affected by a public interest" that might justify the imposition of "certain limitations directly related to the character of the documents as records of government activity." 43 Op. A.G. No. 1 at 6 (Sep. 6, 1974).

After the issuance of this opinion, the Administrator of General Services, Arthur Sampson, executed a depository agreement with President Nixon, under which President Nixon retained title but agreed to donate a substantial portion of the materials to the United States at a future date for research and study. 10 Weekly Comp. of Pres. Docs. 1104 (Sept. 6, 1974). While President Nixon reviewed the materials, they were to be deposited with the General Services Administration (GSA) under the Federal Records Act, 44 U.S.C. 2111,[3] and transferred to California, where they would be stored in locked areas. Neither President Nixon nor GSA could gain access to the materials without mutual consent. In addition, the agreement provided that for three years President Nixon would not withdraw any original writing, although he could make and withdraw copies. After the initial period of three years (five years in the case of original tape recordings), during which the President and archivists working under his direction were to review the materials, President Nixon could withdraw any of the materials and would be entitled to designate any tape recording to be destroyed. Documents not withdrawn or destroyed would be donated to the United States, with appropriate restrictions on public access. All of the tape

---

[2] These materials included approximately 42 million pages of documents, of which President Nixon estimated that he personally prepared or reviewed 200,000. Also included were more than 800 reels of tape recordings of conversations in the Oval Office, the Cabinet Room, and the Lincoln Sitting Room in the White House, and in President Nixon's offices in the Executive Office Building and Camp David. Numerous dictabelt recordings of President Nixon's recollections of daily events were included as well.

[3] The Federal Records Act authorized the Administrator of General Services to accept for deposit "the papers and other historical materials of a President or former President of the United States." 44 U.S.C. 2111.

recordings were to be destroyed after ten years (i.e., after September 1, 1984) or upon President Nixon's death, whichever event occurred first.

B. Presidential Recordings and Materials Preservation Act of 1974

While lawsuits challenging the agreement were pending,[4] Congress passed and President Ford signed PRMPA. In passing the legislation, Congress stated that information included in President Nixon's papers was "needed to complete the prosecutions of Watergate-related crimes" and that there was "a legitimate public interest in gaining appropriate access to materials of the Nixon Presidency which are of general historical significance." H.R. Rep. No. 1507, 93d Cong., 2d Sess. 2 (1974); see also S. Rep. No. 1181, 93rd Cong., 2d Sess. 4 (1974). At the same time, Congress indicated that public access to the materials "is to be provided in a manner comparable to procedures that have been followed by Presidents in providing access to their materials." H.R. Rep. No. 1507 at 5.

Section 101 of PRMPA directs the Archivist to obtain and retain possession and control of all tape recordings and "Presidential historical materials" from the Nixon Administration.[5] Section 102(a) prohibits the destruction of the tapes or materials except as may be provided by law, and Section 102(b) makes them available in response to court subpoena or other legal process or for use in any judicial proceeding. This access was made "subject to any rights, defenses, or privileges which the Federal Government or any person may invoke . . . ." Sections 102(c) and (d) provide that President Nixon (or his designee) and the Executive Branch shall have access to the materials, subject to regulations promulgated under Section 103, which requires the Archivist to issue regulations to govern custody of the materials in Washington, D.C., and to assure the protection of the materials from loss, destruction, or access by unauthorized persons.

Section 104(a) requires the Archivist to issue regulations providing for public access to the Nixon materials. Under Section 104(a) the Archivist, in framing the regulations, is

---

[4] Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975), dismissed as moot (Sep. 21, 1977), rev'd on appeal, The Reporters' Committee for Freedom of the Press v. Sampson, 591 F.2d 944 (D.C. Cir. 1978).

[5] "Historical materials" are defined, by cross-reference to the Federal Records Act, 44 U.S.C. 2101, to include "books, correspondence, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, motion pictures, sound recordings, and other objects or materials having historical or commemorative value."

required to "take into account" seven factors, including (Section 104(a)(5)) "the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials."

As enacted, Section 104(a) required that the public access regulations and any subsequent changes be submitted to both Houses of Congress, and provided that the regulations or changes could be disapproved by a resolution of either House within 90 legislative days of submission. This disapproval procedure was struck down as an unconstitutional legislative veto device in Allen v. Carmen, 578 F. Supp. 951 (D.D.C. 1983), but was found to be severable from the underlying authority to promulgate regulations. In the National Archives and Records Administration Act of 1984, supra, Congress deleted the legislative veto provision and instead required the submission of proposed regulations to Congress 60 days in advance of their effective date. 98 Stat. 2291.

Section 105(a) vests the United States District Court for the District of Columbia with exclusive jurisdiction to hear any constitutional challenge to the Act, any challenge to the validity of any regulation, and any action involving a question of title, ownership, custody, possession, or control of the materials or any award of just compensation required by Section 105(c).[6] Section 105(b) is a severability provision, and Section 106 authorizes appropriations of sums necessary to carry out the provisions of the Act.

C. Nixon v. Administrator of General Services

The day after President Ford signed PRMPA, President Nixon filed suit against the Administrator of General Services (who was then responsible for implementation of the Act), seeking injunctive and declaratory relief. President Nixon alleged that PRMPA was unconstitutional on the grounds that it: (1) infringed the powers reserved to the Executive Branch; (2) invaded executive privilege; (3) infringed President Nixon's constitutional rights of privacy, free speech, and free association; (4) was an unconstitutional search and seizure; and (5) was an unconstitutional bill of attainder.

---

[6] The specific mention in Section 105 of actions to recover damages for deprivation of private property was a compromise by Congress to avoid the controversial ownership issue. See, e.g., H.R. Rep. No. 1507 at 7; S. Rep. No. 1181 at 4. Former President Nixon has filed suit seeking compensation for deprivation of his presidential materials. Nixon v. United States, C.A. No. 80-3277 (D.D.C.) Briefs have been filed on the United States' motion for summary judgment.

A three-judge district court rejected these constitutional claims. Nixon v. Administrator, 408 F. Supp. 321 (D.D.C. 1976). The court emphasized, however, that because no implementing regulations had yet become effective under the Act,[7] the only issue before the court was whether "the regulatory scheme enacted by Congress [was] unconstitutional without reference to the content of any conceivable set of regulations falling within the scope of the Administrator's authority under section 104(a)." 408 F. Supp. at 334-335. Judge McGowan opined for the court that "[w]hen regulations finally become effective, . . . they could . . . eliminate the basis for some of the allegations raised by Mr. Nixon that his rights will be infringed." Id. at 335.

The Supreme Court affirmed the three-judge court's decision in Nixon v. Administrator, 433 U.S. 425 (1977). Like the lower court, it considered only "the facial validity of the provisions of the Act requiring the Administrator to take the recordings and materials into the Government's custody subject to screening by Government archivists." 433 U.S. at 439. Emphasizing that the implementing regulations would have to be sensitive to the claims raised by President Nixon, the Court concluded that the limited intrusion effected by custody and archival screening of the Nixon papers met constitutional requirements.

1. Separation of Powers

President Nixon argued first that regulation of the custody and disclosure of presidential materials constituted an impermissible legislative interference with matters inherently the business solely of the Executive. See 433 U.S. at 440. The Court tested this claim by focusing on the extent to which the Executive Branch was prevented "from accomplishing its constitutionally assigned functions." Id. at 443. The Court stated that "[o]nly where the potential for disruption is present" is it necessary to "determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." Ibid., citing United States v. Nixon, 418 U.S. 683, 711-12 (1974).

Measured against this standard, the Court concluded that "nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face." 433 U.S. at 445. The Court considered it "highly relevant" that the Act provides for custody and screening of the

---

[7] At the time of the district court's decision, the first three sets of regulations proposed by the Administrator had been disapproved by Congress or withdrawn. See p. 10, infra.

materials by officials of the Executive Branch,[8] and that such employees could have access only "for lawful Government use, subject to [the Administrator's] regulations." Although the Act also provides for access to the materials for use in judicial proceedings, and for eventual public access, it expressly recognizes the need both "to protect any party's opportunity to assert any legally or constitutionally based right or privilege", and to return purely private materials. Thus, the Court found that "[t]he Executive Branch remains in full control of the Presidential materials, and the Act facially is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in that branch." Id. at 444. Although the Court recognized "future possibilities for constitutional conflict in the promulgation of regulations respecting public access to particular documents," it concluded that "nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face."[9] Id. at 444-445.

2. Executive Privilege

Second, President Nixon alleged that the screening and potential public disclosure of confidential communications between him and his advisers would adversely affect the ability of future Presidents to obtain the candid advice necessary for effective decisionmaking.[10] See 433 U.S. at 450. The former

---

[8] "The Administrator of General Services, who must promulgate and administer the regulations that are the keystone of the statutory scheme, is himself an official of the Executive Branch, appointed by the President. The career archivists appointed to do the initial screening for the purpose of selecting out and returning to appellant his private and personal papers similarly are Executive Branch employees." 433 U.S. at 441.

[9] The Court also noted (443 U.S. at 445) that there was "abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch," such as the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act, the Federal Records Act, and other specific purpose statutes.

[10] President Nixon's executive privilege argument was limited to what is generally considered the "deliberative process privilege" -- i.e., communications made in confidence as part of the government's decisionmaking process. See United States v. Nixon, 418 U.S. at 705. In both the district court and the Supreme Court, President Nixon acknowledged that the "state secrets privilege" -- "the very specific privilege protecting against disclosure of state secrets and sensitive information concerning military or diplomatic matters" (433 U.S. at 440) -- may be asserted only by an incumbent President. Ibid.

President accordingly asserted that the Act offended the presumptive confidentiality of presidential communications recognized in United States v. Nixon, 418 U.S. 683 (1974). See 433 U.S. at 440.

In assessing this claim, the Court first considered whether a former president can assert executive privilege. While recognizing that the incumbent President both has a greater need for the privilege and a greater ability to assess the need to assert it in particular cases, the Court concluded that former presidents may assert executive privilege. 433 U.S. at 449. Nonetheless, the Court held (id. at 451) that the "mere screening of the materials by the archivists" represented only "a very limited intrusion by personnel in the Executive Branch sensitive to executive concerns" -- an intrusion that was consistent with historical practice and justified both by the perceived need to preserve the materials for legitimate historical and governmental purposes and by the substantial public interest in restoring public confidence and improving Congress's understanding of how the political processes had worked. Id. at 452-53. Because the Court's review was limited to the facial constitutionality of the Act, it did not need to consider whether eventual public access to the presidential materials would present more substantial executive privilege concerns. The Court did, however, suggest that provisions of PRMPA, especially the provision directing the Administrator to take into account "the need to protect any party's opportunity to assert any . . . constitutionally based right or privilege," would provide protection against intrusion into confidential communications of the President and his advisers. See id. at 450-51. In addition, the Court cautioned that "[i]f the broadly written protections of the Act . . . prove[d] inadequate to safeguard [President Nixon's] rights or to prevent usurpation of executive powers, there [would] be time enough to consider that problem in a specific factual context." Id. at 455.

3. Personal Privacy

Third, President Nixon argued that the Act violated his right of personal privacy under the Fourth and Fifth Amendments, because it effected a seizure of all of his records and tape recordings, including materials that may be private and personal, and provided for screening and review of those materials by individuals not chosen or supervised by him. The district court considered this to be "[t]he most troublesome challenge," because the historical practice of most Presidents

had been to exclude or to prohibit review of private materials, such as those relating to personal, financial, or family relations.[11] The district court concluded that "the manner in which such materials have been treated by past Presidents, together with the legislative approval of such treatment, . . . gave rise to a legitimate expectation on Mr. Nixon's part that not all of the materials would be subject to comprehensive review by government personnel without his consent." 408 F. Supp. at 360-361 (citations omitted). Nonetheless, the court found (id. at 362) that archival screening under PRMPA met "the touchstone . . . of reasonableness."

On appeal, the Supreme Court agreed that the Act was "a reasonable response to the difficult problem caused by the mingling of personal and private documents and conversations in the midst of a vastly greater number of nonprivate documents and materials related to government objectives." 433 U.S. at 456, quoting 408 F. Supp. at 367. Recognizing that "public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life" and that President Nixon had a legitimate expectation of privacy in materials concerning such matters, the Court concluded that President Nixon's privacy interests were outweighed by "the public interest in . . . archival screening." Id. at 457-458. The Court noted that the government would return purely private papers and recordings, that the privacy claim related to only "a very small fraction of the massive volume of official materials with which they [were] commingled," and that separation of purely private matters could be achieved only by screening of the materials. Id. at 458-462.

4. First Amendment

The Supreme Court treated separately a second privacy argument made by President Nixon: that the Act's archival screening process would violate his constitutionally protected rights of associational privacy and political speech, because the materials to be reviewed by the archivists included records about his partisan political activities. The Court acknowledged that involvement in partisan politics is closely protected by the First Amendment, and that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 433 U.S. at 467, quoting Buckley v. Valeo, 424 U.S. 1, 64 (1976). Nonetheless, the Court concluded that "the important governmental interests promoted by the Act" outweighed the First Amendment interests, particularly since the archival screening was the least restrictive way of

---

[11] The district court characterized those materials as embracing, for example, "extremely private communications between him and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files." 408 F. Supp. at 359.

promoting the governmental interests, and any burden imposed by the screening was "speculative in light of the Act's terms protecting appellant from improper public disclosures and guaranteeing him full judicial review before any public access is permitted." Id. at 467-468.[12]

Four Justices wrote separate concurring opinions in Nixon v. Administrator. Of particular relevance here is Justice Powell's lengthy partial concurrence setting out his view of the separation of powers claim, and emphasizing the extraordinary, emergency nature of the legislation. Justice Powell noted (433 U.S. at 503) that "[t]he difficult constitutional questions lie ahead," because the Act "deliberately left to the rulemaking process, and to subsequent judicial review, the difficult and sensitive task of reconciling the long-range interests of President Nixon, his advisers, the three branches of Government, and the American public, once custody was established" (id. at 495).[13]

---

[12] The Court also rejected President Nixon's contention that PRMPA constituted a bill of attainder proscribed by Article I, Section 9, of the Constitution. According to President Nixon, Congress intended the Act as a "legislative judgment of blameworthiness," which "singl[ed] out [the President], as opposed to all other Presidents or members of the Government, for disfavored treatment." 433 U.S. at 468, 470. Noting that the Bill of Attainder Clause does not invalidate every statute that burdens particular persons or groups, the Court concludded that Congress did not intend the legislation to "inflict punishment" within the historical meaning of bills of attainder. Id. at 473-484.

[13] Chief Justice Burger and Justice Rehnquist filed lengthy dissenting opinions. The Chief Justice disagreed with the majority on virtually every point. Justice Rehnquist wrote only on the separation of powers issue, concluding that the Act "will undoubtedly restrain the necessary free flow of information to and from the present President and future Presidents." 433 U.S. at 547. Justice Rehnquist specifically rejected the notion that any substantial intrusion upon the effective discharge of the duties of the President could be "balanced" against the interests assertedly fostered by the Act. Ibid. Finally, he expressed considerable concern that the majority opinion "countenance[d] the power of any future Congress to seize the official papers of an outgoing President as he leaves the inaugural stand. In so doing, it poses a real threat to the ability of future Presidents to receive candid advice and to give candid instructions." Id. at 545.

D. Proposed Final Regulations

1. Report of the Nixon Materials Regulations Review Group

Pursuant to the mandate of PRMPA, GSA attempted to promulgate final regulations on five different occasions. The first two sets were disapproved by the Senate pursuant to the legislative veto in Section 104(b).[14] The third set was withdrawn by the Administrator of General Services at the request of the Department of Justice, in order to reconsider the regulations in light of the Supreme Court's decision in Nixon v. Administrator.[15] The fourth set became effective on December 16, 1977, but was later withdrawn by GSA as part of a settlement agreement reached with President Nixon, who had filed suit to challenge the validity of the regulations.[16] The fifth set became effective on March 7, 1980 (45 Fed.Reg. 14855 (Mar. 7, 1980)), but was successfully challenged in a lawsuit filed by 29 former staff or high-level officials of the Nixon Administration. See Allen v. Carmen, 578 F. Supp. 951 (D.D.C. 1983).[17]

---

[14] See S. Res. 244, 121 Cong. Rec. 28362 (1975); S. Res. 428, 122 Cong. Rec. 10159 (1976).

[15] See S. Rep. No. 748, 94th Cong., 2d Sess. 3 (1976).

[16] The settlement agreement reached by the parties to that litigation called for certain revisions to the regulations, and disposed of all of President Nixon's challenges except those concerning creation of public listening centers for presidential tape recordings and archival screening of tapes and dictabelts containing President Nixon's personal diary. Those two remaining issues were resolved in favor of GSA in Nixon v. Solomon, C.A. No. 77-1395, aff'd on other grounds sub nom. Nixon v. Freeman, 670 F. 2d 346 (D.C. Cir), cert. denied, 459 U.S. 1035 (1982).

[17] The district court held, inter alia, that Section 104(b) and the regulations promulgated thereunder were invalid under the reasoning of INS v. Chadha, 462 U.S. 919 (1983). Allen v. Carmen, 578 F. Supp. at 968 (D.D.C. 1983). Defendants were enjoined from further implementing or taking any actions pursuant to the existing public access regulations until such time as newly promulgated regulations become effective. The court found, however, that the authority delegated to the Administrator under Section 104(a) to issue regulations was severable from the legislative veto provision in Section 104(b), and that such authority remained fully valid along with the remainder of the Act. Id. at 971. The government did not appeal the district court's decision. As noted above, Congress subsequently repealed the legislative veto device in Section 104(b) and substituted a report-and-wait provision.

Following the Allen v. Carmen decision, the Archivist established the Nixon Materials Review Group (Review Group) to study and make recommendations on possible changes in, or alternatives to, the invalidated regulations. The Review Group, which consisted of three federal employees experienced in the archival processing of presidential materials, was charged "with the broad responsibility of rigorously reviewing all of the . . . regulations to determine if changes [were] necessary for reasons of (a) archival efficiency and compliance with commonly accepted archival standards; (b) consistency with the practices of Presidential libraries; or (c) compliance with [PRMPA]." Report of the Nixon Materials Review Group (Mar. 20, 1984) at 1. The Review Group did not address the legal sufficiency of the regulations. On March 28, 1984, the Review Group issued a report recommending that the set of regulations challenged in Allen v. Carmen be issued unchanged.

2. Contents of Proposed Regulations

With one exception,[18] NARA adopted the recommendations of the Review Group. After receiving public comments, NARA submitted the proposed final regulations to OMB for review under Executive Order 12291.

NARA takes the position that the proposed set of regulations "provides for archival treatment of the Nixon materials that is comparable to the treatment of similar materials of other Presidents in the Presidential libraries," except insofar as PRMPA requires otherwise. 50 Fed. Reg. 12576 (Mar. 29, 1985). The regulations require the Archivist to obtain exclusive legal custody and control of all "Presidential historical materials of the Nixon Administration." Section

---

[18] In order to meet constitutional objections raised by the Department of Justice, NARA modified the regulations governing composition of the Presidential Materials Review Board (see n.28, infra). Under prior sets of regulations, the Board included an archivist or historian nominated by the Council of the Society of American Archivists, "who shall not otherwise be a Federal employee or official." The Department of Justice advised NARA that this regulation was unconstitutional, because vesting decisionmaking responsibility for screening presidential materials in the hands of someone outside the Executive Branch was inconsistent with the theory adopted by the Supreme Court in Nixon v. Administrator to sustain the constitutionality of the Act -- i.e., that the materials would be within the exclusive control of the Executive Branch. The newly proposed regulations avoid this pitfall by requiring appointment of a historian from a federal agency to this position.

1275.14.[19] The regulations govern both archival processing of the materials (including segregation of materials that either should be returned to the originator or should be restricted from public access)[20] and eventual public access to the materials.

a. Archival Processing and Segregation of Materials

Section 1275.46 of the proposed regulations requires the archivists to process the materials for the purpose of segregating -- removing from the original files -- certain types of materials.[21] First, the archivists must segregate "private or

---

[19] In fact, the Archivist has already gained possession of all such materials. "Presidential historical materials" include:

> all papers, correspondence, documents, pamphlets, books, photographs, films, motion pictures, sound and video recordings, machine-readable media, plats, maps, models, pictures, works of art, and other objects or materials made or received by former President Richard M. Nixon or by members of his staff in connection with his constitutional or statutory powers or duties as President and retained or appropriate for retention as evidence of or information about these powers or duties. Included in this definition are materials relating to the political activities of former President Nixon or members of his staff, but only when those activities directly relate to or have a direct effect upon the carrying out of constitutional or statutory powers or duties.

Section 1275.16(a).

[20] Materials deemed to be "private or personal materials" are returned to their originator; all other segregated materials remain in the control of the Archivist but are removed from the files available for public access.

[21] The required archival processing of the Nixon materials involves three phases. In the first phase, the archivists examine the materials to establish physical and documentary control over them and to take any necessary steps to preserve the materials. In the second phase, the archivists review the materials to develop finding aids, such as folder title lists, series descriptions, and subject logs. Finally, in the third phase the archivists actually segregate the materials prior to opening the files for public access. See Nixon v. Freeman, 670 F.2d at 353.

personal materials"[22] for the purpose of transferring them to their "proprietary or commemorative owner." Section 1275.42(a). Second, the archivists must segregate materials that neither relate to "abuses of governmental power,"[23] (i.e., Watergate materials) nor otherwise possess "general historical significance."[24] Section 1275.46(b). Finally, the archivists must segregate materials subject to certain enumerated restrictions. Sec. 1275.46(c).

Under Section 1275.50(a), the archivists must segregate Watergate materials if:

(1) the Archivist is in the process of reviewing or has determined the validity of a claim by any person of a legal or constitutional right or privilege;[25]

(2) the Archivist is in the process of reviewing or has determined the validity of a petition by any person of the need to protect an individual's right to a fair and impartial trial;

(3) the release of the materials would violate a federal statute;

---

[22] "Private or personal materials" are defined to include (Section 1275.16(b)):

> those papers and other documentary or commemorative materials in any physical form relating solely to a person's family or other non-governmental activities, including private political associations, and having no connection with his constitutional or statutory powers or duties as President or as a member of the President's staff.

[23] "Abuses of governmental power popularly identified under the generic term 'Watergate,'" is defined to include alleged acts within the purview of the charters of the Senate Select Committee on Presidential Campaign Activities or the Watergate Special Prosecution Force, or as circumscribed by the Articles of Impeachment adopted by the House Judiciary Committee. Section 1275.16(c).

[24] "General historical significance" is defined to mean "having administrative, legal, research or other historical value as evidence of or information about the constitutional or statutory powers or duties of the President, which an archivist has determined is of a quality sufficient to warrant the retention by the United States of materials so designated." Section 1275.16(c).

[25] See p. 17, infra.

(4) the materials are authorized under criteria established by executive order to be kept classified, with questions about the proper classification to be resolved in accordance with the applicable executive order.[26] Section 1275.50(a). The Archivist must also restrict access to any portion of materials relating to abuses of governmental power if

> the release of those portions would constitute a clearly unwarranted invasion of personal privacy or constitute libel of a living person: Provided, That if material related to an abuse of governmental power refers to, involves or incorporates such personal information, the Archivist will make available such personal information, or portions thereof, if such personal information, or portions thereof, is essential to an understanding of the abuses of governmental power.

Section 1275.50(b).

The Archivist must also segregate non-Watergate materials if:

(1) release would disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(2) release would constitute a clearly unwarranted invasion of personal privacy or constitute libel of a living person;[27] or

(3) release would disclose investigatory materials compiled for law enforcement purposes, and disclosure of such records would (a) interfere with enforcement proceedings; (b) deprive a person of a right to a fair trial or an impartial adjudication; (c) constitute an unwarranted invasion of personal privacy; (d) disclose the identity of a confidential source; (e) disclose investigative techniques or procedures; or (f) endanger the life or physical safety of law enforcement personnel. Section 1275.52(b).

If the archivists are unable to determine whether segregation is required by any of these provisions, or if they

---

[26] The Archivist may waive this restriction, upon certain conditions, for individuals engaged in historical research. Section 1275.50(a)(4).

[27] This is the same standard used for restriction of Watergate materials, except that it does not include the further proviso that information "essential to an understanding of the abuses of governmental power" shall not be restricted.

conclude that the required determination "raises significant issues involving interpretation of these regulations or will have far-reaching precedential value," they are to submit the materials to a panel of senior archivists. Section 1275.46(d). This panel, in turn, may certify the determination to the Presidential Materials Review Board,[28] which may either make a final administrative determination or recommend an initial decision to the Senior Archival Panel. Section 1275.46(g), (h).[29]

b. Access to Nixon Materials

Once archival processing has been completed for an "integral file segment,"[30] the Archivist must open for public access all materials in that segment that have neither been segregated pursuant to Section 1275.46 nor are subject to outstanding claims or petitions seeking such restrictions. Sections 1275.42(a). At least 30 days prior to opening any records to public access, the Archivist must publish notice in the Federal Register identifying the materials to be opened. The notice must also include a reference to the right of any interested person to claim, under the provisions of Section 1275.44 (see infra), a legal or constitutional right or privilege that would prevent or limit public access to any of

---

[28] The Presidential Materials Review Board consists of the Archivist of the United States, the Assistant Archivist for the Office of the National Archives, the Assistant Archivist for the Office of the Presidential Libraries, the Director of the Legal Counsel Staff of NARA, and a historian of a federal agency selected by the Archivist. Section 1275.46(f).

[29] The regulations also provide for periodic review of the materials placed under restriction, so that the archivists may make available for public access "those materials which, with the passage of time or other circumstances, no longer require restriction," and for appeal by researchers (presumably after records have been opened to the public) for removal of specific restrictions. Sections 1275.54, 1275.56. The Archivist must comply with the notice requirements of Section 1275.42 before opening any previously restricted records. Ibid.

[30] The regulations prescribe that the Archivist will process and open the Nixon materials by "integral file segment," which refers to "an archival determination that a particular group of processed documents constitutes an intelligible and complete unit for purposes of historical research." Nixon v. Freeman, 670 F.2d at 352 n.11, quoting "Nixon Materials Archival Processing Manual." The Archivist must give priority, "insofar as practicable," to processing of Watergate materials. Section 1275.42(a).

the materials. Ibid. Copies of the notice must be sent to the following individuals:

(1) the incumbent President or his agent;

(2) President Nixon or his designated agent or heirs;

(3) any former staff member reasonably identifiable as the individual responsible for creating or maintaining the file segment proposed to be opened;

(4) any individual named in the material that the Archivist may not restrict in accordance with Section 1275.50(b) (i.e., material that is "private or personal" but that may not be restricted because it is essential to an understanding of an abuse of governmental power); and

(5) any individuals who are named in the materials and who have requested that the Archivist provide personal notice of the proposed opening of integral file segments when those segments contain references about them. Section 1275.42(b) & (c).

Objections to disclosure must be filed with the Archivist within 30 days after publication of the notice. An individual may file an objection claiming

(1) a legal or constitutional right or privilege which would prevent or limit public access to any of the materials (section 1275.44(a));

(2) that public access to any of the materials may jeopardize an individual's right to a fair and impartial trial (Section 1275.44(b)); or

(3) that the materials are private or personal and that he or she is the proprietary or commemorative owner (Section 1275.44(d)).

An objection must be in writing and must identify the specific materials to which it relates. Section 1275.44(a). Unless the claim is that the materials are private and personal, the Archivist is responsible for making the final administrative decision regarding access. Ibid. In making that decision, he "may consult with other appropriate Federal agencies." Section 1275.44(c). If the claim alleges that the materials are private or personal, the Archivist must transmit the claim to the Presidential Materials Review Board, which is then responsible

for issuing a final administrative decision. Sections 1275.44(d), 1275.46(i).[31]

The Archivist may not permit public access to the contested materials while objections to their release are pending. If the Archivist's administrative determination is adverse to the claimant, the Archivist must refrain from opening the material to public access for at least 30 days after the claimant receives notification of the decision. Section 1275.44(a). The claimant may then seek judicial review in the United States District Court for the District of Columbia under Section 105(a) of the PRMPA.

Presidential materials that are not restricted (either by the Archivist or by court order) become available for public reference, in locations and under rules prescribed by the Archivist. Section 1275.62. In particular, the regulations provide (in accordance with the settlement agreement in Nixon v. Freeman) that researchers may listen to reference copies of certain tape recordings at the National Archives Building in Washington, D.C. and at other locations chosen by the Archivist. Section 1275.64(c). The regulations do not allow members of the public to reproduce the tapes. Section 1275.64(a)(3).

II. ANALYSIS

The Supreme Court in Nixon v. Administrator repeatedly emphasized the critical importance of the requirement in Section 104(a)(5) of the PRMPA that regulations promulgated by the Archivist protect "any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials." In rejecting the separation of powers objections raised by President Nixon, the Court stessed (433 U.S. at 44):

> [A]lthough some of the materials may eventually be made available for public access, the Act expressly recognizes the need both "to protect any party's opportunity to assert any legally or constitutionally based right or privilege," § 104(a)(5), and to return purely private materials to appellant, § 104(a)(7). These provisions plainly guard against disclosures barred by any defenses or privileges available to appellant or the Executive Branch.

---

[31] Upon receiving such a claim, the Board must notify the claimant of its impending consideration and allow him to supplement his reasons for the claim. The Board must also publish notice of its consideration in the Federal Register and must then receive and take into account the views of any member of the public respecting the public or private nature of the materials. After considering all of the positions put forth, the Board must issue a written decision, including any concurring or dissenting opinions. Section 1275.46(i).

Similarly, in reviewing President Nixon's executive privilege claim, the Court emphasized that "any eventual public access will be governed by the guidelines of § 104, which direct the Administrator to take into account 'the need to protect any party's opportunity to assert any . . . constitutionally based right or privilege,' § 104(a)(5), and the need to return purely private materials to the appellant, § 104(a)(7)." Id. at 450.

The regulations proposed by NARA would implement the statutory mandate in two ways: (1) the Archivist, after reviewing the materials, will restrict public access to or return certain types of materials;[32] and (2) the Archivist will provide notice of the opening of file segments and an opportunity to object to release of specific materials.[33] You have asked this Office to consider whether these provisions adequately protect the interests of parties who may be able to object to disclosure on constitutional or other legal grounds. The following discussion focuses primarily on whether the proposed regulations provide sufficient protection for documents covered by executive privilege. We also discuss whether the scheme set up by the proposed regulations to provide notice and an opportunity to object is legally sufficient in view of the volume of materials to be released.

A. Executive Privilege

United States v. Nixon recognized that there is a legitimate governmental interest in preserving the confidentiality of communications to and from the President and among those who advise him. The Court acknowledged that "those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." 418 U.S. at 705. With the exception of classified or classifiable information,[34] however, the proposed regulations do not require the Archivist to segregate materials that would fall within the scope of executive privilege -- i.e., confidential predecisional communications between or among the President and

---

[32] See discussion at ps. 14-15, supra.

[33] See discussion at ps. 16-17, supra.

[34] The regulations do require the Archivist to segregate and withhold from public access any materials that "are authorized under criteria established by Executive order to be kept secret," and provide that any question about the proper classification of materials be resolved in accordance with the applicable executive order (i.e., Executive Order 12356). Section 1275.50(a). Thus, the proposed regulations provide substantial protection for materials that would fall within the "state secrets" arm of executive privilege.

his advisers.[35] Instead, protection for privileged materials is dependent upon the claims process. Any individual who believes he may be able to assert a legal or constitutional privilege against disclosure must review the materials and file a claim with the Archivist asserting that specific materials should not be released. The Archivist then makes an administrative decision, reviewable in the United States District Court for the District of Columbia, on whether to uphold the claim. See discussion at p. 17, supra.

On their face, the proposed regulations make no distinction between an incumbent President's claim of executive privilege and objections raised by other parties. The incumbent President, like the former President and certain other interested individuals, will receive notice as each integral file segment is opened, and he bears the burden of reviewing all of the materials and identifying those that should be restricted from public disclosure. Furthermore, by their terms the regulations would require the President, like any other person claiming a privilege, to file written objections to release of specific materials, and the Archivist would then make the final administrative determination whether those materials should be withheld. Without express qualification, the regulations state:

> Unless the claim states that particular materials are private or personal . . . , the Archivist will notify the claimant by certified mail, return receipt requested, of his decision regarding public access to the pertinent materials.

Section 1275.44(a) (emphasis added). The burden would then rest on the claimant to challenge in court any adverse decision by the Archivist. See p. 17, supra.

Needless to say, if this provision applied literally to claims of the incumbent President -- that is, if the Archivist could deny an incumbent President's claim of executive privilege, thereby forcing the President to test the Archivist's decision in court -- it would be an unconstitutional infringement on the President's power. We believe, however, that this provision need not and should not be read to allow the Archivist to sit in judgment on an incumbent President's claim of executive privilege. On the contrary, we believe that the Archivist, as an officer of the Executive Branch, is legally bound to respect such claims.

---

[35] The report issued by the Review Group takes the position that most materials falling within the category of "confidential communications" would already be segregated under one of the enumerated categories (such as personal privacy or national security).

Article II, Section 1 of the Constitution vests "[t]he executive Power" in the President. Article II, Section 3 requires the President to "take Care that the Laws be faithfully executed . . . ." In order to perform these functions, the President must have the assistance of subordinate officials who will carry out his policies and implement his instructions with respect to execution of the law. From its earliest decisions, the Supreme Court has consistently recognized this basic principle. For example, in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 164 (1803), Chief Justice Marshall stated:

> By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.

This fundamental principle -- that the President must be able to supervise and control the actions of subordinate Executive Branch officers -- was reiterated in the Supreme Court's trilogy of cases involving the President's power to remove federal officials. In Myers v. United States, 272 U.S. 52 (1926), the Court invalidated a statute that limited the President's power to remove certain postmasters. In reaching this conclusion, the Court noted that "Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers — a conclusion confirmed by his obligation to take care that the laws be faithfully executed . . . ." 272 U.S. at 163-64. The Myers Court echoed the reasoning of Marbury v. Madison. Noting that all Executive Branch officers are "under the general administrative control of the President by virtue of the general grant to him of the executive power," the Court emphasized that the President "may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." 272 U.S. at 135. With respect to the statutory responsibility of Executive Branch officers to promulgate regulations, the Court stated (ibid.): "The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President

should have the power to remove them." In Humphrey's Executor v. United States, 295 U.S. 602 (1935), and Wiener v. United States, 357 U.S. 349 (1958), the Court acknowledged limits to the President's removal power,[36] but explicitly reiterated and reinforced the link between the President's dual rights to control and to remove Executive Branch officials.[37] See also Buckley v. Valeo, 424 U.S. 1, 123 (1976). The critical need for presidential supervision of officers who perform executive functions underlies the recent holding by the United States District Court for the District of Columbia that the Comptroller General (who is removable by Congress) may not constitutionally exercise executive functions:

---

[36] In Synar v. United States, No. 85-3945 (Feb. 7, 1986), the United States District Court for the District of Columbia noted that the intellectual foundations of Humphrey's Executor have eroded:

> It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely "independent" regulatory agencies . . . . Moreover, "quasi-legislative" and "quasi-judicial" functions can no longer be regarded as extraordinary or even unusual activities of executive agencies. Finally, the expansion of due process protections, statutorily prescribed procedures for both rulemaking and adjudications and an elaborate system of judicial review, have provided in more targeted fashion some of the protection against political intervention, when it is appropriate, which Humphrey's Executor sought to provide wholesale. It has in any event always been difficult to reconcile Humphrey's Executor's "headless fourth branch" with a constitutional text and tradition establishing three branches of government . . . .

Slip op. at 40-41 (citations omitted).

[37] As the Court noted in Humphrey's Executor, 295 U.S. at 629-630," [t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there."

> We are confident . . . that congressional removal power cannot be approved with regard to an officer who actually participates in the execution of the laws. Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.

Synar v. United States, slip op. at 46, No. 85-3945 (Feb. 7, 1986).

The Archivist is appointed by the President, with the advice and consent of the Senate,[38] and is removable by the President. See 44 U.S.C. 2103. The Archivist is unquestionably a purely executive officer. He serves at the pleasure of the President and is therefore subject to the President's supervision and control. Indeed, as the Supreme Court made clear in Nixon v. Administrator (433 U.S. at 424), grave separation of powers questions would be raised if those responsible for implementing the provisions of PRMPA were not officers or employees of the Executive Branch, and thus under the supervision and control of the President: "The Executive Branch remains in full control of the Presidential materials, and the Act facially is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in that branch."

Moreover, the assertion of executive privilege is an exercise not of any statutory authority given to a subordinate officer of the Executive Branch, but of the inherent constitutional authority of the President.[39] The privilege to withhold information is implicit in the scheme of Article II and particularly in the provisions that vest in the President the "execu-

---

[38] "The Archivist of the United States shall be appointed by the President by and with the advice and consent of the Senate. The Archivist shall be appointed without regard to political affiliations and solely on the basis of the professional qualifications required to perform the duties and responsibilities of the office of Archivist. The Archivist may be removed from office by the President. The President shall communicate the reasons for any such removal to each House of Congress."

[39] PRMPA does not purport to give the Archivist any independent statutory authority to assert executive privilege, but rather only directs the Archivist to take into consideration the "need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to [th5e Nixon materials]." Section 104(a)(5).

tive power" and the responsibility to execute the laws. The Supreme Court explicitly recognized this constitutional basis for executive privilege in United States v. Nixon (418 U.S. at 705-706):

> Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

Although the responsibility to assert executive privilege may be exercised, on behalf of the President, by subordinate Executive Branch officers,[40] the privilege is the President's, and his judgment that the privilege should be asserted cannot be overridden by officers or employees of the Executive Branch.

The regulations proposed by NARA necessarily must be read against this backdrop. Although the proposed regulations provide that the Archivist will make the final administrative determinations on questions of executive privilege, those determinations must be made under the supervision and control of the incumbent President. Thus, while the Archivist is certainly free to offer advice as to whether particular documents, in his judgment, are or should be protected by executive privilege, the Archivist has no legal authority to make a determination

---

[40] See, e.g., United States v. Reynolds, 345 U.S. 1, 7-8 (1953) (state secrets privilege may be asserted by the head of an executive department).

inconsistent with the President's assertion of executive privilege.[41]

We do not believe that our legal conclusion necessitates any revision to the proposed regulations. Indeed, it is quite unusual for administrative regulations to recite explicitly that any decision to be made under the regulations is subject to the direction and control of the President; the President's authority to supervise and control the actions of his subordinate officers is implicit in any regulations implementing statutory or constitutional authority. It would be equally extraordinary for the regulations proposed by NARA to recite explicitly that the Archivist is bound by the incumbent President's assertions of executive privilege. The ability of the incumbent President to assert the privilege, and the duty of the Archivist to execute the President's decisions, must be regarded as implicit in the Archivist's responsibility under the regulations.

A related question is whether the Archivist must honor claims of executive privilege raised by former President Nixon. Since the Archivist, as previously noted, is an Executive Branch official subject to the authority of the incumbent President, the question really is how the incumbent President

41 As previously noted, a literal interpretation of the Archivist's authority under the proposed regulations would require the President to bring suit against the Archivist to keep particular documents from being disclosed. The Department of Justice has long taken the position that no case or controversy under Article III exists when the opposing parties are two executive agencies, both of whose heads serve at the pleasure of the President. See Letter from F. Henry Habicht, Assistant Attorney General, Land and Natural Resources Division to Rep. John D. Dingell, Chairman, Subcommittee on Oversight and Investigations (Dec. 4, 1985). Because the President can resolve such a dispute as part of his responsibility to execute the laws, there is no concrete adversity between the parties. This Article III jurisdictional defect would apply a fortiori to lawsuits between the President and one of his subordinate officers. To be sure, in Nixon v. United States the Supreme Court entertained a suit between a sitting President and one of his current subordinate officers. In that case, however, the Court emphasized that the Special Prosecutor had been granted a unique degree of independence from the rest of the Executive Branch, and through regulation had been given explicit power to contest the invocation of executive privilege in the process of seeking evidence. 418 U.S. at 694-695. The Archivist, on the other hand, enjoys no such independence. Moreover, the Court in Nixon emphasized that because the matter arose in the course of a federal criminal prosecution, it was within the traditional scope of the Article III power. This consideration would obviously not apply to a civil suit seeking an injunction against disclosure of privileged materials.

should properly treat a claim of executive privilege asserted by a predecessor.

We start from the proposition, recognized in Nixon v. Administrator (433 U.S. at 448-449), that a former President may independently assert executive privilege. Noting that the effective discharge of the President's duties depends on his ability to receive candid advice and information from his subordinates, the Court reasoned (ibid.):

> The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President's tenure.

The Court further observed (id. at 449 (emphasis added)) that "the fact that neither [former] President Ford nor [then incumbent] President Carter supported [former President Nixon's claim] detract[ed] from the weight of his contention." Implicit in this statement was the recognition that this lack of support went only to the weight of the claim and did not necessarily undermine it.

The Court's conclusion and reasoning in Nixon v. Administrator strongly indicate, in our view, that an incumbent President should respect a former President's claim of executive privilege even if the incumbent either (a) would not have personally invoked the privilege under the circumstances or (b) does not believe that the documents fall within the scope of the privilege. A former President's privilege would be of little value if it were dependent upon the ratification of his successors. Moreover, we believe that it would be inconsistent with the rationale underlying the former President's privilege for the incumbent to sit as judge of the validity of a predecessor's claim. To be sure, an incumbent President reviewing a former President's assertion of executive privilege would no doubt be strongly influenced by the reality that his own claim of privilege might someday depend on a future President's willingness to uphold it. Nonetheless, a former President has independent authority to claim executive privilege precisely because an incumbent may not be willing to safeguard the confidential communications of prior (and perhaps politically antagonistic) administrations. The incumbent and his staff may not be sufficiently sensitive to the need to preserve the confidentiality of documents relating to matters with which they were not involved and may be unfamiliar. Furthermore, an incumbent administration's decision to disclose particular documents created during a prior administration might be influenced by considerations of political advantage. Accordingly, we believe that, as a general matter, an incumbent

President should respect a former President's claim of executive privilege without judging the validity of the claim. Any judgment regarding such a claim should be left to the judiciary in litigation between the former President and parties seeking disclosure. Only if such disputes are resolved by the judiciary will the integrity of the priivilege be preserved and the potential for an appearance of impropriety be avoided.

While we conclude that it is generally not appropriate for an incumbent President to review and adjudicate the merits of a predecessor's claim of executive privilege, this principle must yield when it conflicts with the discharge of the incumbent's constitutional responsibilities. Accordingly, if the incumbent President believes that the discharge of his constitutional duties (e.g., investigation and prosecution of alleged crimes) demands the disclosure of documents claimed by the former President to be privileged, it may be necessary for him to oppose a former President's claim. This situation, however, should not be confused with situations involving only a generalized public interest in disclosure.

In sum, we believe that it follows from the conclusion and reasoning in Nixon v. Administrator that an incumbent President should respect a claim of executive privilege asserted by a former President unless the incumbent concludes that respecting such a claim would impair his ability to discharge his constitutional responsibilities. And just as we believe, for the reasons previously explained, that the Archivist must and will honor any claim of executive privilege asserted by an incumbent President, we believe that the Archivist must and will treat any claim by a former President in the manner outlined in this opinion.

B. Adequacy of Notice

Your request also necessitates an inquiry regarding whether the regulations provide a sufficient opportunity for parties (including the incumbent President) to review materials as they are opened and to object to their release. Two aspects of the regulations are critical in this regard: (1) the 30-day period for filing claims and (2) the extent of notice to be provided to interested parties.

1. Thirty-day Period for Filing Claims

The proposed regulations provide that the Archivist will publish notice in the Federal Register "[a]t least 30 calendar days prior to the opening to public access of any integral file segment of the materials." Section 1275.42(b). The purpose of the 30-day period is to allow persons to review the documents and file with the Archivist any constitutional or other legal objections to their release. Objections must be in writing, must state the claimed right or privilege, and must identify the "specific materials to which [the objection] relates." Section

We would have grave reservations about the statutory sufficiency of the notice period if the 30 days provided in the regulations posed an absolute time bar to any party's opportunity to raise constitutional or legal objections to release of specific materials. Given the volume and sensitivity of documents likely to be released in any integral file segment,[42] 30 days might well not be long enough to conduct a comprehensive review of the documents, to identify the "specific materials" that may be subject to a right or privilege barring release, and to file claims covering those materials. NARA, however, has made clear that the 30-day period is a minimum, not a maximum, and will be extended for good cause.[43] Moreover, NARA has stated its intention to allow the two parties with the heaviest review burden -- the incumbent President and former President Nixon -- access to the documents in advance of the opening of any integral file segment in order to conduct a preliminary review. In practice, then, we understand that sufficient time will be provided to ensure that all parties have adequate opportunity to review the materials and to file their claims.

The regulations could, of course, be revised to reflect NARA's stated position that the 30-day period will be extended if necessary to ensure an adequate opportunity for reviewing the documents and filing objections. We do not believe, however, that the absence of such a specific provision is fatal to the legality of the regulations. The Archivist's responsibility under PRMPA to "protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to [the Nixon materials]" must be construed to include the responsibility to provide reasonable time for affected parties to assert such rights or privileges. The regulations do not alter the Archivist's statutory responsibility to provide reasonable time; they merely set a minimum, which is not on its face arbitrary. Assuming the Archivist implements his responsibility evenhandedly and

---

[42] For example, in 1983 GSA published notice, pursuant to the fifth set of regulations, that it would open the Nixon "Special Files" for public access. The Special Files, which were a single filing unit initiated by President Nixon in 1972 for documents prepared by high-level staff or administration officials that were perceived as particularly sensitive, consist of 628 cubic feet of textual materials. They include files from 37 staff members, the White House Administrative Files and Subject Category Files, the President's Office Files, and the President's Personal Files. 48 Fed. Reg. 36655 (Aug. 12, 1983).

[43] In fact, GSA twice extended the deadline for filing objections to disclosure of the Special Files in order to enable interested individuals to complete their review and file objections.

reasonably, by granting extensions upon a showing that a party has not had a reasonable time to review the documents and file claims, we believe the regulations are legally sufficient. We note that even absent any specific provision in the regulations governing the Archivist's responsibility to extend the time period, a refusal by the Archivist to grant additional time could be challenged as an abuse of discretion, if the claimant could demonstrate that the existing period was inadequate to protect his legal and constitutional interests.[44] Therefore, we believe that the rights of interested parties would be protected against any abuse of authority by the Archivist.

2. Extent of notice

Prior to the opening of each file segment, individual written notice will be given to (1) the incumbent President, (2) President Nixon, (3) staff members who created or who were responsible for maintaining a file, (4) individuals named in materials that are private or personal but are essential to an understanding of an abuse of governmental power, and (5) any persons who are named in the materials to be opened and who have requested that their names be placed on a registry maintained by NARA.[45] Section 1275. 42(c). "Universal" notice -- i.e., personal, written notice to every individual who is named or discussed in the Nixon materials -- will not be provided. The question we address here is whether, in order to meet the mandate of Section 104(a)(5), the Archivist must provide universal notice.

NARA has refused in the past to provide for universal notice. According to NARA, universal notice is not standard archival practice for other presidential libraries or other federal records archives. Moreover, the administrative burden and additional time entailed would be substantial. NARA has estimated that with present staff levels it would take 17 years just to identify every person in the Special Files, locate addresses, and prepare notification letters, and more than 300 years to notify every person mentioned in the 40 million pages of the entire Nixon materials. See Report of the Nixon Materials Review Group at 9; draft preamble to proposed regulations at 11.

---

[44] Consistent with our view that the Archivist is subject to the direction and control of the incumbent President, we believe the Archivist would have to honor any presidential request for additional time in which to review the documents and to claim privilege. And for the reasons previously stated, we believe that the same must be true with respect to requests made by the former President.

[45] Notice will also be published in the Federal Register. Section 1275.42(b).

We recognize that any system short of universal notice may deprive some individuals of the opportunity to assert a privilege or other legal right against nondisclosure. For example, an individual may have a right under the regulations to block disclosure of certain portions of the materials on the ground that their release "would constitute a clearly unwarranted invasion of personal privacy . . . or libel." Section 1275.50(b). Unless the individual suspects, however, that the materials contain such references and therefore places his or her name on the registry, the individual will not receive notice, and the right to nondisclosure will be lost. Thus, only universal notice would fully protect every "party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to [the] recordings and materials." Section 104(a)(5).

Nevertheless, because universal notice would be unduly burdensome and costly, and would result in substantial delay in opening the Nixon papers to the public, we think that the system adopted in the regulations satisfies the statute by adequately "tak[ing] into account" the desirability of providing the fullest notice practicable. Although the regulations do not guarantee universal notice, they adopt the next best alternative. Under the regulations, an individual interested in receiving notice may place his or her name on a registry simply by writing to the Archives. When the Archives subsequently proposes to open a segment of the records, it will not just send out a form notice to everyone on the registry. Rather, the regulations clearly state that individuals listed on the registry will receive "personal notice . . . when [the] segments [to be opened] contain references about them." Section 1275.42(c). NARA has made clear that archivists will assist individuals in finding the particular references that triggered the notice.

While the possibility exists under the regulations that some individuals may lose the opportunity to assert valid claims against disclosure due to the lack of universal notice, we believe that protection of the presumably small number of claims falling into this category is outweighed by the prohibitive cost, burden, and delay of universal notice. Needless to say, the defense of this notice scheme would be substantially fortified if the Archives were to undertake, on a voluntary basis and within the constraints imposed by its limited resources, to provide notice to locatable individuals who are mentioned in the materials but are not listed in the registry. We strongly recommend this procedure.

III. CONCLUSION

In sum, we conclude that the regulations proposed by NARA, when interpreted and administered as set forth in this opinion, are adequate to fulfill the statutory mandate of Section 104(a)(5) to protect the opportunity of all parties to assert legal and constitutional objections to disclosure. We caution that our review is limited to the facial legality of the regulations, rather than their legality as applied in particular cases.

Charles J. Cooper
Assistant Attorney General
Office of Legal Counsel

APPENDIX B

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

DEPARTMENT OF JUSTICE OPINION ON REGULATIONS GOVERNING ACCESS TO NIXON ADMINISTRATION MATERIALS UNDER THE PRESIDENTIAL RECORDINGS AND MATERIALS PRESERVATION ACT

Richard Ehlke
Specialist in American
Public Law
April 10, 1986

DEPARTMENT OF JUSTICE OPINION ON REGULATIONS GOVERNING ACCESS TO NIXON ADMINISTRATION MATERIALS UNDER THE PRESIDENTIAL RECORDINGS AND MATERIALS PRESERVATION ACT

This report presents a critique of a Department of Justice Office of Legal Counsel interpretation of one aspect of recently issued regulations governing archival processing of and access to Nixon administration materials. The possible impact of the opinion on the operation of the Presidential Records Act of 1978 is also discussed.

I.

The regulations, implementing the Presidential Recordings and Materials Preservation Act of 1974 (PRMA), 44 U.S.C. 2111 note, were published on February 28, 1986, with an effective date of June 26, 1986. 51 Fed. Reg. 7228 (1986). They represent the culmination of an 11-year process during which various versions of the regulations were disapproved by Congress and both proposed regulations and the underlying Act were the subject of numerous lawsuits. This report will not recount that process[1] but focuses instead on reservations expressed by the Department of Justice with respect to one aspect of the public access provisions of the current set of regulations.

---

[1] The Act was designed to take control of tape recordings of certain conversations that took place during the Nixon administration as well as the other presidential historical materials of that administration and to provide a system for appropriate public access to these materials. For background on the operation of the Act and the promulgation of implementing regulations, see, Allen v. Carmen, 578 F.Supp. 951 (D.D.C. 1983); Nixon v. Freeman, 670 F.2d 346 (D.C.Cir.), cert. denied, 459 U.S. 1035 (1982); Nixon v. Administrator of General Services, 433 U.S. 425 (1977).

The Department and the Office of Management and Budget (pursuant to the regulatory review process of Executive Order 12291) approved the regulations subject to the interpretation set forth in a February 18, 1986 memorandum from the Department's Office of Legal Counsel (hereafter, OLC Memorandum). The Department's concerns were with the treatment the Archivist was to accord to assertions of executive privilege made by the incumbent and former President to block public access to certain materials. The PRMA directs the Archivist to take custody of Nixon tape recordings and presidential materials, process them, return certain of them to the former President and others and restrict access to some, and, finally, provide public access to the remainder. Section 104(a) of the Act requires the Archivist to take into account seven factors in the public access regulations, including "the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials."

The regulations establish a system whereby notice of the intent to open a segment of the materials to public access is published in the Federal Register at least 30 days prior to opening and copies of the notice are sent to interested parties, including the incumbent President and former President Nixon. Within 30 days of the publication of the notice, "any person claiming a legal or constitutional right or privilege which would prevent or limit public access to any of the materials shall notify the Archivist in writing of the claimed right or privilege and the specific materials to which it relates." 36 CFR 1275.44(a); 51 Fed. Reg. 7233. The Archivist is to notify the claimant of his decision regarding public access and, if the decision is adverse to the claimant, refrain from opening the materials for at least 30 days. While the regulations do not so provide, Section 105(a) of the PRMA affords a claimant

the right to seek judicial review of the Archivist's decision in the United States District Court for the District of Columbia.[2]

The regulations provide that access to certain materials will be restricted if the Archivist determines during processing that they are purely private or personal materials, that their disclosure is prohibited by statute, or that the materials are classified. Material the release of which would constitute a clearly unwarranted invasion of privacy or would libel a living person may also be restricted. Non-Watergate material may be restricted if certain criteria are met. 36 CFR 1275.50, 1275.52; 51 Fed. Reg. 7234-5. However, material that may be subject to a claim of executive privilege as defined in United States v. Nixon, 418 U.S. 683 (1974) — confidential communications between the President and his advisors — is not segregated during its initial processing but is instead subject to the claims procedure in 36 CFR 1275.44, supra, in which the Archivist determines the validity of the claim subject to judicial review.[3]

---

[2] See, OLC Memorandum at 17. See also, Ricchio v. Kline, 773 F.2d 1389 (D.C.Cir. 1985)(PRMA, and not Freedom of Information Act, is the vehicle for seeking public access to Nixon materials); Nixon v. Warner Communications, 435 U.S. 589, 606 (1978)(PRMA governs release of Nixon materials introduced as evidence in Watergate criminal proceeding).

[3] Former President Nixon's attorney objected to the regulations because, among other things, they do not provide for a restriction on access based on executive privilege but instead place the burden on Mr. Nixon and others to make the claim. In introductory comments accompanying the publication of the regulations, the Archives rejected this objection and explained its rationale regarding claims of executive privilege:

> During the notice period prior to release, the regulations provide all parties, including the incumbent President, the opportunity to raise any objection or claim of privilege. This would include the right to raise any executive or Presidential privilege claim. This is the type of privilege which is reserved to the President or

II.

The OLC Memorandum focuses on "whether the proposed regulations provide sufficient protection for documents covered by executive privilege." OLC Memorandum 18. It notes that the regulations do not require initial segregation of potentially privileged material and "make no distinction between an incumbent President's claim of executive privilege and objections raised by other parties." The Memorandum then concludes:

> Needless to say, if this provision applied literally to claims of the incumbent President — that is, if the Archivist could deny an incumbent President's claim of executive privilege, thereby forcing the President to test the archivist's decision in court — it would be an unconstitutional infringement on the President's power. We believe, however, that this provision need not and should not be read to allow the Archivist to sit in judgment on an incumbent President's claim of executive privilege. On the contrary, we believe that the Archivist as an officer of the Executive Branch, is legally bound to respect such claims.
>
> * * *
>
> Although the proposed regulations provide that the Archivist will make the final administrative determinations on questions of executive privilege, those determinations must be made under the supervision and control of the

---

former Presidents. The incumbent President has not objected to our proposed regulations including the placement of responsibility for claims of privilege. Mr. Mortenson's objection implies that we should assert a claim of privilege on behalf of Mr. Nixon. This we cannot do.

Executive privilege is not included as a separate category of restriction in other Presidential libraries. Also, the Presidential Records Act places a time limit of 12 years on executive privilege type claims [44 U.S.C. 2204]. We are quickly approaching the twelfth anniversary of the resignation of Mr. Nixon. We believe that our regulations provide the most realistic way to handle a potential claim of executive privilege over these Nixon Presidential historical materials.

51 Fed. Reg. 7230.

> incumbent President. Thus, while the Archivist is certainly free to offer advice as to whether particular documents, in his judgment, are or should be protected by executive privilege, the Archivist has no legal authority to make a determination inconsistent with the President's assertion of executive privilege.
> OLC Memorandum at 19, 23-4.

The Department saw no need to revise the regulations and therefore approved them because in its view "[t]he ability of the incumbent President to assert the privilege, and the duty of the Archivist to execute the President's decisions, must be regarded as implicit in the Archivist's responsibility under the regulations." Id. 24.[4]

The Department further advised that in the case of claims of executive privilege made by Mr. Nixon, an incumbent President should respect such claims unless they conflict with the incumbent's discharge of his constitutional duties. The Archivist, in the Department's view, is thus bound to honor the former President's claims just as he is bound by assertions of privilege by the incumbent. OLC Memorandum 26.

---

[4] A variant of the Department's argument is that Congress cannot vest in an officer functions that are to be performed independently of presidential control and supervision. Another articulation -- one more applicable to the case at hand -- would be that delegated authority cannot be interpreted in such a way as to authorize action by an executive officer that is to be performed independently of the President. The PRMA does not by its terms require that the Archivist sit in judgment of presidential assertions of executive privilege claims; it merely requires that in promulgating public access regulations the Archivist is to protect the opportunity of any party to assert any privileges it may have. The Department is not arguing (nor could it argue) that the claims procedures established by the regulations are contrary to the terms of the statute. The administrative procedures would seem to be consistent with the law's requirement that the opportunity for asserting privilege be protected. The President is, after all, not denied the opportunity to assert privilege and to have that claim tested in court. Similarly, a system whereby the Archivist automatically accedes to presidential claims and leaves to private parties who are seeking public access the burden of bringing suit would also not seem to be inconsistent with the statute. The Department, however, is arguing that such a system is required, not by the terms of the statute, but by separation of powers principles inherent in the Constitution.

The premise of the Department's argument is that the grant of the executive power to the President in Article II of the Constitution means that the President must be able to supervise and control the actions of subordinate Executive Branch officers. Relying most heavily on the cases involving the removal power — Myers v. United States, 272 U.S. 52 (1926), Humphrey's Executor v. United States, 295 U.S. 602 (1935) and Wiener v. United States, 357 U.S. 349 (1958) — as well as Marbury v. Madison, 5 U.S. 137 (1803), the OLC Memorandum concludes that since the Archivist is a purely executive officer, appointed and removable by the President, he is therefore subject to the President's unlimited control. OLC Memorandum 20-1. In order to perform his constitutional duty to "take Care that the laws be faithfully executed" (Art. II, Section 3), the President must have subordinates "who will carry out his policies and implement his instructions with respect to execution of the law." OLC Memorandum 20.

This theory of a "unitary" President who must have complete control over all those who implement public law has recently received increased attention in the scholarly community and in litigation. The District Court in Synar v. United States, C.A.No. 85-3945 (D.D.C. Feb. 7, 1986), the decision striking down the Gramm-Rudman-Hollings Act, held that Congress could not vest what the court viewed as executive powers in an officer — the Comptroller General — who was not removable by, and therefore not under the supervisory control of, the President. In the course of its opinion, doubts were even expressed over the continued viability of independent regulatory agencies that operate outside the direct control of the President. Slip Op. at 40. The Justice Department's brief in Synar not only argued that the law's functions could not be vested in an officer removable by the Congress (as is the Comptroller General) but also

that even if the Comptroller General is an independent officer of the United States, he cannot perform these functions because he has been placed above the President who is the chief executive officer.[5] A similar challenge is being mounted against the authority of the Federal Trade Commission. Ticor Title Insurance Co. v. FTC, C.A.No. 85-3089 (D.D.C. Jan. 2, 1986)(dismissed as not ripe). Commentators have also recently addressed the issue. See, Tiefer, The Constitutionality of Independent Officers as Checks on Abuses of Executive Power, 63 Boston U. L. Rev. 59 (1983); Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch of Government, 84 Colum. L. Rev. 573 (1984); Regulatory Management at OMB, in S. Comm. Print 99-134, Office of Management and Budget: Evolving Roles and Future Issues, Senate Governmental Affairs Comm., 99th Cong., 2d Sess. 185, 219-229 (1986).

Regardless of the merits of the foregoing debate, the regulatory structure established by the Archivist under the FRMA and the nature of the Archivist's position can be distinguished from the legal construct propounded in the OLC Memorandum. The case law on removal relied on in the Memorandum stands for the proposition that in order to fulfill his constitutional responsibility to faithfully execute the laws the President cannot be deprived of his power to remove at will those officers who perform purely executive functions. Myers

---

[5] Similar challenges have been mounted against the Comptroller General's role under the Competition in Contracting Act whereby unsuccesful bidders on government contracts may file protests with the Comptroller General whose consideration of such protests has the effect of staying the award of the disputed contract by the agency. The Third Circuit Court of Appeals recently upheld the constitutionality of vesting such power in the Comptroller General, noting that Congress has given the Comptroller General a degree of independence from both the executive and legislative branches and that such independent authority does not intrude upon executive (or judicial) decisionmaking. Ameron, Inc. v. United States Corps of Engineers, Nos. 85-5226 & 85-5377 (3rd Cir. March 27, 1986). See also, Lear Siegler, Inc. v. Lehman, No. CV 85-1125-KN (C.D.Cal. Nov. 21, 1985).

v. United States, 272 U.S. 52, 117 (1926). It is arguably reading Myers too broadly, however, to infer from that that no executive officer may be vested with authority to act or make a decision independently of presidential input or dictation. The Court itself made a distinction between officers operating in "the field of the President's political executive power," such as military and foreign affairs and "protection of the public domain," and officers "engaged in the discharge of their other normal duties." 272 U.S. at 133-4. With respect to the latter, unrestricted presidential removal power was deemed necessary so that the President "may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." The court went on:

> Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President should have the power to remove them. 272 U.S. at 135.

The Court in Myers thus distinguished between officers performing so-called "political" functions and those exercising "normal duties" pursuant to statutorily delegated authority. With respect to the former "political" officers, Congress may be limited in insulating their functions from presidential control. With respect to the latter, however, removal power was deemed necessary to ensure that the officer's statutory duties were indeed carried out in an efficient and able manner. The President was to see that the law passed by Congress was faithfully executed with "ability and judgment" and that the

officer was not negligent or inefficient. The Court did not hold that in all instances the President must be able to dictate particular decisions and control the exercise of discretion of such an officer acting under a statutory delegation of authority. In practice, the removal power may well be a forceful factor in influencing action. However, the presence of the removal power was not held in Myers to disable Congress from vesting duties in subordinate executive officers that were to be performed free of presidential dictation (other than that inherent in the power to remove).

The Archivist is appointed by the President by and with advice and consent of the Senate and is removable at the will of the President. 44 U.S.C. 2103 (Supp. II 1984). The constitutional question raised in the removal cases is, therefore, not present. Furthermore, the determination of the validity of an incumbent's executive privilege claim under the regulations involves no final, substantive making of policy. Unlike the actions of independent regulatory agencies, the Archivist's determination does not affect the conduct of third parties, determine its propriety, or adjudicate rights and benefits under public law. An adverse determination on a president's claim of privilege merely sets the stage for judicial adjudication of the validity of the claim. It is a vehicle to secure judicial consideration of the question not unlike numerous other situations in law where intragovernmental litigation occurs.[6]

---

[6] See, United States v. Nixon, 418 U.S. 683, 693 (1974)(citing cases of intra-branch disputes held to be justiciable by the courts). See also, 12 U.S.C. 1828 (1982), the Bank Merger Act, where Congress established a system under which the Comptroller of the Currency, appointed and removable by the President, makes the initial determination of the propriety of a proposed bank merger. The Department of Justice, if it disagrees with the Comptroller's decision, can then sue to enjoin the merger on antitrust grounds. The Comptroller may intervene in such action as a party defendant. This system of securing adjudication of a question via litigation between executive officials was cited in Nixon as posing no justiciability problems and the long line of

In fact, the Archivist's familiarity with the materials would seem to add cogency to his views as to their content and sensitivity thereby providing a court asked to rule on the validity of a privilege claim with the factual grounding and competing arguments necessary to render a considered decision.

Viewed thusly, the question becomes whether placing the burden to initiate suit on the President in the case of an adverse determination by the Archivist violates the Constitution. It would not seem to infringe on a president's ability to assert privilege because ultimate judicial determination will result whether the Archivist denies his claim or he is sued by a member of the public seeking access to the materials claimed to be privileged.[7] Either circumstance requires the President to defend his claim of privilege and submit to court review. The requirement that he initiate the suit also would not seem to rise to the magnitude of a violation of separation of powers given the likely inevitability of a lawsuit and the necessity to defend his claim of privilege in court regardless of the precise means in which the litigation is prompted. Such a "burden" on the incumbent arguably does not "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions," the test for determining a separation of powers violation. Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977); Ameron v. United States Corps of Engineers, Nos. 85-5226 & 85-5377 (3rd Cir. March 27, 1986), slip

---

cases under the Act has raised no constitutional questions with the system. See, United States v. Marine Bancorporation, 418 U.S. 602 (1974) cited in 418 U.S. at 693; United States v. Philadelphia National Bank, 374 U.S. 321 (1963); see also, United States v. Federal Maritime Commission, 655 F.2d 247, 250-2 (D.c.Cir. 1980)(Justice Department challenge to FMC order); Koniag v. Andrus, 580 F.2d 601 (D.C.Cir.), cert. denied, 439 U.S. 1052 (1978)(Fish and Wildlife Service and Forest Service appeal of Bureau of Indian Affairs decision).

[7] See note 2, supra.

op. at 12, 25.

The court in Nixon v. Freeman, 670 F.2d 346 (D.C.Cir. 1982), in the course of upholding a version of the access regulations, noted the possibility of an incumbent President asserting privilege by means of the claims procedure and hinted at no constitutional problems with such a procedure. The court rejected Mr. Nixon's argument that the presumptive nature of executive privilege required the Archivist to affirmatively segregate materials that may be covered by the privilege and that the burden should not be placed on him to come forward to challenge any disclosure that he thinks will violate the privilege. This feature of the regulations was seen as "justified by the very nature of the privilege." 670 F.2d at 359.[8] The court went on to note that the incumbent President may assert privilege in place of Mr. Nixon and intimated no constitutional problem with such a regulatory procedure:

> [W]e think that those who see in disclosure a threat to the privilege must be given a meaningful opportunity to contest disclosure on that basis. The regulations give Mr. Nixon such an opportunity. He can raise a challenge by sending a letter to the Administrator explaining his position; only if his claim is rejected administratively need he present his claim in court. Moreover, recalling the Supreme Court's observations about the incumbent's superior ability to perceive threats to the privilege, the Executive Branch may well raise a challenge when such threats appear, thereby alleviating Mr. Nixon's burdens.
> 670 F.2d at 359 (citation omitted).

III.

The OLC Memorandum also concludes that the incumbent President should respect the former President's claims of executive privilege unless the

---

[8] See, note 3, supra.

incumbent determines that such a claim would impair his ability to discharge his constitutional responsibilities. It follows from the Department's prior analysis that the Archivist must also honor the claim. This conclusion, according to the OLC Memorandum, follows from "the conclusion and reasoning" in Nixon v. Administrator. The Court in Nixon v. Administrator held that a former President could assert executive privilege. However, it said nothing of the incumbent's duties with respect to that claim. In fact, in that case, the incumbent did not support former President Nixon's claim that archival screening under the PRMA violated executive privilege. The Court noted that the support or lack thereof of a former president's claim by the incumbent influenced the weight to be given to the former president's assertion in that case that the PRMA impermissibly intruded on the functioning of the Executive Branch. 433 U.S. at 449. It did not, however, intimate that the incumbent was under an obligation to honor that claim or specific claims of privilege that the former President might assert with respect to future archival regulations or disclosure decisions.

Subjecting the former President's privilege claims to the administrative procedure established by the regulations would not seem to raise the same separation of powers concerns that the Department sees with respect to an incumbent's claims. The court in Nixon v. Freeman, supra, clearly approved of a procedure whereby the former President must present his claim to the Archivist and seek judicial review in the case of an adverse administrative determination. 670 F.2d at 259. The Archivist is not, after all, a subordinate officer of the former President. Furthermore, as is the case with an incumbent's claims, the administrative procedure is merely a vehicle by which judicial determination of the validity of privilege claims is obtained.

IV.

The Presidential Records Act of 1978 establishes procedures for the preservation, custody and public release of official presidential materials beginning with the Reagan administration. 44 U.S.C. 2201 et seq. The Archivist is vested with regulatory authority under the Act and it is possible that conflicts with both former presidents and the incumbent over access to materials may arise. After an initial period during which certain records may be restricted, public access to presidential records is to be governed, with certain exceptions, by the Freedom of Information Act. 44 U.S.C. 2204(c)(1). The Archivist is also required to make presidential records available pursuant to judicial process, to an incumbent President "if such records contain information that is needed for the conduct of current business of his office and that is not otherwise available," and to Congress. Such disclosures are "subject to any rights, defenses, or privileges which the United States or any agency or person may invoke." 44 U.S.C. 2205(2). The Act also contains a disclaimer that "[n]othing in this Act shall be construed to confirm, limit, or expand any constitutionally based privilege which may be available to an incumbent or former President." 44 U.S.C. 2204(c)(2).

The Presidential Records Act thus contains provisions that may give rise to conflicts between an Archivist and an incumbent President similar to those present under the PRMA regulations. For instance, the Archivist presumably may disagree on an incumbent's need for a former president's records, 44 U.S.C. 2205(2)(B), or determine that records may be disclosed to Congress contrary to the wishes of an incumbent President. 44 U.S.C. 2205(2)(C). The Archivist must also be consulted by an incumbent President prior to the disposal of

presidential materials and the President must wait until the Archivist determines whether or not to notify Congress of the proposed disposal before disposing of the material. 44 U.S.C. 2203(c), (d), (e).

Regulations implementing the Presidential Records Act have yet to be promulgated. The Department of Justice, however, raised concerns about earlier versions of the Act that echo much of the argument made in the OLC Memorandum. Furthermore, the enacted version of the Act does not appear to totally alleviate the bases for those concerns. For instance, the Department questioned the validity of requiring an incumbent President to specifically identify a former president's papers that may be needed for current business and to make the case that they are not available elsewhere. It noted that such prefatory requirements could prove "disruptive of legitimate Executive functions." Hearings on Presidential Records Act of 1978 Before a Subcomm. of House Government Operations Comm., 95th Cong., 2d Sess. 120 (1978). That specific provision was modified but the Act still requires the Archivist to provide access "to an incumbent President if such records contain information that is needed for the conduct of current business of his office and that is not otherwise available." 44 U.S.C. 2205(2)(B). Thus, some degree of judgment on the part of the Archivist seems to be assumed. In the absence of final regulations implementing this provision it is difficult to speculate on the Department's reaction to whatever procedures are established.

The Department also voiced more general concerns over the Archivist's role in public access decisions. It employed arguments similar to those in the OLC Memorandum:

> ...[W]e note that the archivist is the party instructed to make the decisions respecting release. While the bill does not so specify, it can be fairly assumed — indeed must be

> assumed — that in performing this function he will be guided by the President then in Office. The Archivist is an appointee of the General Services Administration (44 U.S.C. 2102). The Administrator is himself a Presidential appointee who occupies a position within the Executive Branch and who serves at the pleasure of the President just as do other heads of Executive departments and agencies. (40 U.S.C. 751(b)). As is true of all other duties performed by these officials, they are ultimately responsible to the President and the President may instruct them in the performance of their duties. No constitutional issues arise as a result of that relationship so long as the President does not give instructions inconsistent with constitutional or appropriate statutory prohibitions. Thus, in performing the responsibilities outlined in H.R. 10998, the Archivist would, we assume, represent the Chief Executive and would perform under his direction the constitutional functions devolving upon the incumbent President discussed in Nixon v. Administrator and in United States v. Nixon.
> Hearings, supra at 123-4.

Employing the phraseology used above, the Department apparently views a structure under which an incumbent President is required to advance arguments before the Archivist and which contemplates adverse decisions by the Archivist as not an "appropriate statutory" requirement. As noted above, the Presidential Records Act would seem to carry in certain of its provisions the same potential for prompting constitutional questions on the part of the Department. An articulation of those views, of course, will have to await the issuance by the Archivist of regulations implementing the Act. Whether the Department's views on the PRMA regulations influence the content of those regulations remains to be seen.

Richard Ehlke
Specialist in American
Public Law
April 10, 1986

APPENDIX C

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-222963 June 10, 1986

The Honorable Charles McC. Mathias, Jr.
Chairman, Subcommittee on Government
Efficiency and the District of
Columbia
Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

This responds to your letter of April 22, 1986, also signed by Senators Eagleton and Chiles. You asked us to review a recent opinion by the Office of Legal Counsel (OLC), Department of Justice, which addresses regulations issued by the Archivist of the United States to carry out his functions under the Presidential Recordings and Materials Preservation Act of 1974, as amended, with respect to the historical materials of former President Nixon.

The enclosed detailed analysis presents the results of our review and answers each of the specific questions you posed regarding the OLC opinion. The most significant aspect of the opinion, in our view, is OLC's conclusion that the Archivist must accept without challenge any claim of executive privilege asserted by former President Nixon, even if the Archivist believes that the documents involved are outside the scope of the privilege. We find this conclusion to be inconsistent with the Archivist's regulations and contrary to his statutory responsibilities under the 1974 Act. This conclusion is also at odds with past practice under the Act. On several occasions the Archivist, with the support of the Justice Department, has reviewed and evaluated claims of executive privilege asserted by Mr. Nixon and has rejected many of Mr. Nixon's claims.

Finally, we believe that OLC's conclusion in this case calls into question whether the Justice Department will permit the Archivist to exercise fully his responsibilities under the Presidential Records Act of 1978 with respect to the materials of future ex-Presidents.

We hope that our analysis will be useful to you in considering the issues raised by the OLC opinion.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States

Enclosure

B-222963

ANALYSIS OF OFFICE OF LEGAL COUNSEL
OPINION ON NATIONAL ARCHIVES
REGULATIONS GOVERNING ACCESS TO MATERIALS OF THE
NIXON PRESIDENCY

We have been asked to review an Office of Legal Counsel opinion concerning regulations promulgated recently by the Archivist of the United States to implement his functions under the Presidential Recordings and Materials Preservation Act of 1974, as amended. This Act, which governs the records of former President Nixon, requires the Archivist to develop regulations that will open the historical materials of the Nixon presidency to public access subject, among other conditions, to preserving a party's opportunity to assert claims of constitutional privilege. The Office of Legal Counsel opinion centers on how the Archivist should respond to claims of executive privilege which might be asserted by either an incumbent President or former President Nixon in an effort to prevent public access to the Nixon historical materials.

The Archivist's regulations in question here represent the sixth attempt since 1974 to promulgate rules to effect public access to the Nixon materials under the 1974 Act. The Act itself has been subject to protracted litigation, including a constitutional challenge by former President Nixon that was decided by the United States Supreme Court. An overview of the Act and the actions that have occurred under it, with particular reference to the issues of executive privilege addressed in the Office of Legal Counsel opinion, is necessary to put in context the specific questions submitted to us.

I. BACKGROUND

On December 19, 1974, the Presidential Recordings and Materials Preservation Act, Public Law No. 93-526, 88 Stat. 1695, was enacted to govern the records of former President Richard M. Nixon. Nullifying an earlier agreement between Mr. Nixon and the Administrator of the General Services Administration (GSA), title I of the Act provided for Mr. Nixon's materials to be placed in the custody and control of the Administrator, who was assigned certain functions and responsibilities with regard to those materials. The Act was amended in 1984 to substitute the Archivist of the United States for the Administrator.[1/]

1/ See the National Archives and Records Administration Act of 1984, Public Law No. 98-497 (October 19, 1984), § 107(c), 98 Stat. 2291.

Under title I of the Act, as amended, 44 U.S.C. § 2111 note (Supp. II, 1984), the Archivist is to process and screen the Nixon materials; return to Mr. Nixon those materials that are personal; and establish terms and conditions under which those materials of historical significance may be opened for public access. Section 104(a) of the Act requires the Archivist to develop regulations that would provide public access to the Nixon materials, taking into account the following factors, among others:

> "(1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term 'Watergate';
>
> * * * * *
>
> "(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;
>
> "(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1) * * *."

As originally enacted, section 104(b) subjected these regulations to a legislative veto. 88 Stat. 1697. This subsection was amended in 1984 to substitute for the legislative veto a provision that the regulations not take effect until the expiration of 60 legislative days following their submission to the Congress.

Section 105(a) of the Act vests the United States District Court for the District of Columbia with exclusive jurisdiction--

> "* * * to hear challenges to the legal or constitutional validity of this title or of any regulation issued under the authority granted by this title, and any action or

> proceeding involving the question of title, ownership, custody, possession, or control of any tape recording of material referred to in section 101 or involving payment of any just compensation which may be due in connection therewith. * * *"

On the day after the 1974 Act was enacted, former President Nixon initiated a lawsuit to challenge its constitutionality. Affirming a three-judge district court decision, the United States Supreme Court in Nixon v. Administrator, 433 U.S. 425 (1977), upheld the constitutionality of the Act.

Among his other contentions, Mr. Nixon had asserted that the Act's requirement for archival review of his presidential materials violated his constitutional right of executive privilege. The Supreme Court adopted the Solicitor General's view that a former President still could assert executive privilege. 433 U.S. at 448-49, but went on to hold that the archival review called for by the 1974 Act did not violate Mr. Nixon's executive privilege rights. The Court noted that "the fact that neither President Ford nor President Carter supports appellant's claim detracts from the weight of his contention that the Act impermissibly intrudes into the executive function and the needs of the Executive Branch." Id. at 449. The Court also emphasized that the issue before it concerned only whether the Act was constitutional on its face:

> "* * * We must, of course, presume that the Administrator and the career archivists concerned will carry out the duties assigned to them by the Act. Thus, there is no basis for appellant's claim that the Act 'reverses' the presumption in favor of confidentiality of Presidential papers recognized in United States v. Nixon. Appellant's right to assert the privilege is specifically preserved by the Act. The guideline provisions on their face are as broad as the privilege itself. If the broadly written protections of the Act should nevertheless prove inadequate to safeguard appellant's rights or to prevent usurpation of executive powers, there will be time enough to

consider that problem in a specific factual context. For the present, we hold, in agreement with the District Court, that the Act on its face does not violate the Presidential privilege." Id. at 455.

Prior to the set of implementing regulations developed by the Archivist that are now pending, there were five attempts by GSA to promulgate regulations under section 104 of the Act. The first three versions were disapproved by legislative veto; the fourth version became effective briefly, but GSA withdrew these regulations as part of the settlement of another lawsuit by Mr. Nixon; and the fifth version was invalidated by the United States District Court for the District of Columbia in Allen v. Carmen, 578 F. Supp. 951 (1983), on the ground that they were "tainted" by exercise of the unconstitutional legislative veto.

The current set of regulations was published as a proposed rulemaking on March 29, 1985, 50 Fed. Reg. 12575. These regulations were published without substantive change as a final rule on February 28, 1986, 51 Fed. Reg. 7228, and were submitted to the Congress on February 26, 1986. They are to become effective on June 26, 1986. The regulations are to be codified as 36 C.F.R. Part 1275; the description hereafter refers to the C.F.R. sections.

The regulations provide in 36 C.F.R. § 1275.42(a) for initial archival processing of the Nixon materials with priority given to segregating private or personal materials and transferring them to their owners. The Archivist will then open for public access all materials which are neither restricted pursuant to § 1275.50 or § 1275.52 of the regulations nor subject to outstanding claims of persons seeking such restrictions. The restricted categories contained in §§ 1275.50 and 1275.52 include those historical materials: for which the Archivist is in the process of reviewing or has determined under 36 C.F.R. § 1275.44 the validity of a claim of privilege or need to protect the right to a fair trial; whose release would violate a Federal statute or would constitute a clearly unwarranted invasion of personal privacy or libel of a living person; or which are subject to classification in the interest of national defense or foreign policy. See 36 C.F.R. §§ 1275.50(a)(1)-(4); 1275.50(b); and

1275.52(a). Additional restricted categories are provided for non-"Watergate" historical materials. See 36 C.F.R. § 1275.52(b).

After segregation of materials covered by the restricted categories, the remaining materials would be opened for public access on the basis of "integral file segments" covering a complete unit for purposes of historical research. At least 30 days before an integral file segment is opened, the Archivist would publish notice of the proposed opening in the Federal Register and would also provide individual notice to the incumbent President and to former President Nixon, among other persons. 36 C.F.R. § 1275.42(b). With respect to privilege claims, the regulations provide in section 1275.44(a):

> "Within 30 days following publication of the notice prescribed in § 1275.42(b), any person claiming a legal or constitutional right or privilege which would prevent or limit public access to any of the materials shall notify the Archivist in writing of the claimed right or privilege and the specific materials to which it relates. Unless the claim states that particular materials are private or personal (see paragraph (d) of this section), the Archivist will notify the claimant by certified mail, return receipt requested, of his decision regarding public access to the pertinent materials. If that decision is adverse to the claimant, the Archivist will refrain from providing public access to the pertinent materials for at least 30 calendar days from receipt by the claimant of such notice."

On July 11, 1985, the National Archives had submitted the regulations to the Office of Management and Budget (OMB) for final review pursuant to Executive Order No. 12291, 46 Fed. Reg. 13193 (1981), 5 U.S.C. § 601 note (1982). By letter dated February 21, 1986, Mr. Robert P. Bedell, Deputy Administrator of OMB's Office of Information and Regulatory Affairs, informed the Acting Archivist that "we have concluded our review and believe that the rule as submitted for our review, and as interpreted in the enclosed memorandum from the Office of Legal Counsel in the Department of Justice, is consistent with Executive Order No. 12291." Mr. Bedell's letter enclosed

a 30-page memorandum to him dated February 18, 1986, signed by Mr. Charles J. Cooper, Assistant Attorney General for the Office of Legal Counsel (OLC), captioned "Nixon Papers Regulations."

The OLC opinion recites the reasons why it was requested and its ultimate finding as follows:

> "You have asked that this Office review the proposed regulations to determine whether they meet the statutory mandate of PRMPA [the Presidential Recordings and Materials Preservation Act] to 'protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials.' As we discuss below, we believe the proposed regulations are adequate to meet that standard, so long as they are interpreted and administered as set forth in this opinion." OLC opinion at page 1.

In accordance with the above mandate, the opinion's analysis "focuses primarily on whether the proposed regulations provide sufficient protection for documents covered by executive privilege." Id. at 18. The opinion draws two basic conclusions on this point. First, it holds that the Archivist is required to accept any claim of executive privilege with respect to the Nixon materials that might be asserted by the incumbent President. Second, it holds that the Archivist also is bound to accept any claim of executive privilege over the materials asserted by former President Nixon.

The OLC opinion recognizes that the regulations provide for the Archivist to review and make administrative decisions concerning executive privilege claims but concludes:

> "Needless to say, if this provision applied literally to claims of the incumbent President -- that is, if the Archivist could deny an incumbent President's claim of executive privilege, thereby forcing the President to test the Archivist's decision in court -- it would be an unconstitutional infringement

> on the President's power. We believe, however, that this provision need not and should not be read to allow the Archivist to sit in judgment on an incumbent President's claim of executive privilege. On the contrary, we believe that the Archivist, as an officer of the Executive Branch, is legally bound to respect such claims." Id. at 19.

The opinion goes on to state that this legal conclusion does not necessitate any revision to the regulations:

> "* * * the President's authority to supervise and control the actions of his subordinate officers is implicit in any regulations implementing statutory or constitutional authority. It would be * * * extraordinary for the regulations * * * to recite explicitly that the Archivist is bound by the incumbent President's assertions of executive privilege. The ability of the incumbent President to assert the privilege, and the duty of the Archivist to execute the President's decisions, must be regarded as implicit in the Archivist's responsibility under the regulations." Id. at 24.

The opinion next turns to the question of how the Archivist should respond to an assertion of executive privilege by Mr. Nixon. By way of an analytical framework, the opinion suggests that:

> "Since the Archivist, as previously noted, is an Executive Branch official subject to the authority of the incumbent President, the question really is how the incumbent President should properly treat a claim of executive privilege asserted by a predecessor." Id. at 24-25.

The opinion answers this question as follows:

> "The Court's conclusion and reasoning in Nixon v. Administrator strongly indicate, in our view, that an incumbent President should

> respect a former President's claim of executive privilege even if the incumbent either (a) would not have personally invoked the privilege under the circumstances or (b) does not believe that the documents fall within the scope of the privilege. A former President's privilege would be of little value if it were dependent upon the ratification of his successors. Moreover, we believe that it would be inconsistent with the rationale underlying the former President's privilege for the incumbent to sit as judge of the validity of a predecessor's claim. * * * Accordingly, we believe that, as a general matter, an incumbent President should respect a former President's claim of executive privilege without judging the validity of the claim. Any judgment regarding such a claim should be left to the judiciary in litigation between the former President and parties seeking disclosure. Only if such disputes are resolved by the judiciary will the integrity of the privilege be preserved and the potential for an appearance of impropriety be avoided." Id. at 25-26.

The only exception which the opinion recognizes to this general principle of deference is when the incumbent believes that the discharge of his constitutional duties demands the release of information over a former President's claim of privilege. The opinion cautions that "[t]his situation, however, should not be confused with situations involving only a generalized public interest in disclosure." Id. at 26.

Summarizing the opinion's conclusions on the two issues discussed above it states:

> "* * * just as we believe, for the reasons previously explained, that the Archivist must and will honor any claim of executive privilege asserted by an incumbent President, we believe that the Archivist must and will treat any claim by a former President in the manner outlined in this opinion." Id.

Thus, the OLC opinion requires the Archivist to accept without challenge any claim of executive privilege that former President Nixon may assert, even if the Archivist does not believe

that the documents fall within the scope of the privilege and regardless of any generalized public interest in disclosure of the documents.

II. QUESTIONS AND ANSWERS

Against this background, we turn to the specific questions posed regarding the OLC opinion.

QUESTION 1: Is the OLC opinion binding on the Archives? What is the difference between an opinion of the Office of Legal Counsel and an opinion of the Attorney General in this regard?

ANSWER: Archives officials testified at an April 29 congressional hearing on this subject[2/] that they are "bound" by the OLC opinion because OMB's clearance of their regulations was conditioned upon compliance with the OLC opinion and because the Justice Department could control their position on this issue in litigation. While the OLC opinion does not have the "binding" effect of a formal Attorney General opinion, we believe that the Archives officials' reaction is correct as a practical matter. We also believe, however, that the Archivist cannot legally implement the OLC opinion without changing his regulations. See answer to question 2.

ANALYSIS: The Attorney General regards his formal opinions as having binding effect within the Executive Branch. See, e.g., 42 Op. Att'y. Gen. 405, 415-416 (1969); 38 Op. Att'y Gen. 176 (1935); see also, Smith v. Jackson, 241 F. 747, 773 (5th Cir. 1917), aff'd., 246 U.S. 388 (1918), quoting with approval the statement in an Attorney General opinion that "administrative officers should regard [such opinions] as law until withdrawn by the Attorney General or overruled by the courts * * *."

An OLC opinion does not have the same status. Under 28 C.F.R. § 0.25(a) (1985), OLC has authority only to

---

2/ Hearing before the Government Information, Justice, and Agriculture Subcommittee of the House Committee on Government Operations, Review of Nixon Presidential Materials Access Regulations (April 29, 1986).

"prepar[e]" the formal opinions of the Attorney General, but it can "rende[r] informal opinions and legal advice to the various agencies of the Government * * *." Since the opinion in this matter was issued over the signature of the Assistant Attorney General for OLC, it appears to be an "informal opinion."

Nevertheless, while this opinion was not requested by or addressed to the Archivist, it purports to say how the Archivist must act in order to comply with the law. Pursuant to 28 U.S.C. § 516 (1982), the Justice Department would represent the Archivist in any litigation over the issues addressed in the OLC opinion. Therefore, the Department ultimately controls the Archivist's legal position on these issues. Since the OLC opinion is written in mandatory terms, clearly it was meant to affect the Archivist's actions. We believe it is reasonable for the Archivist to conclude that the Justice Department would not support him in litigation if he acted contrary to the opinion.

We also can appreciate why the Archives officials regard the OLC opinion as binding on them through the clearance granted by OMB under Executive Order No. 12291. Mr. Bedell's February 21 letter advised the Acting Archivist that the final regulations "as interpreted in" the OLC opinion were "consistent with Executive Order No. 12291." This language certainly appears to condition OMB's clearance on the Archivist's adherence to the OLC opinion. We note, however, that Mr. Bedell suggested at the April 29 congressional hearing[3]/ that this was not the intent of his letter.

QUESTION 2: To what extent is the OLC opinion inconsistent with the final regulations? What is the significance of these differences?

ANSWER: We believe that the OLC opinion is fundamentally inconsistent with the final regulations, and that this inconsistency precludes the Archivist from following the opinion under the current regulations.

ANALYSIS: As discussed previously, the regulations clearly provide for the Archivist to review executive privilege claims and to make administrative determinations

---

3/ See note 2, supra.

(subject to judicial review) on the validity of such claims. Consistent with the plain language of the regulations, Archives officials have advised us that this was, in fact, how they planned to handle executive privilege claims before they received the OLC opinion. Thus, adherence to the opinion would effect a fundamental departure from the process called for by the regulations without actually amending them. We believe this is untenable.

The OLC opinion recognizes that the regulations on their face are inconsistent with its view that the Archivist cannot make administrative determinations on executive privilege claims. However, it asserts that the authority of an incumbent President to direct the Archivist's actions in response to the incumbent's assertion of privilege can be read into the regulations. We believe that the issues of whether the Archivist would be bound to accept any assertion of executive privilege by the incumbent President and whether such a result is implied in the current regulations are largely academic. An incumbent President has never asserted executive privilege with regard to the Nixon materials and we suspect that this is not likely to occur in the future.

The real issues, in our view, relate to the OLC opinion's conclusion that the Archivist must defer to any executive privilege claim asserted by Mr. Nixon. We see no way in which this conclusion can be read into the current regulations. The opinion's theory of incorporating an incumbent President's power to direct the Archivist into the regulations obviously does not apply to a former President, who has no authority over the Archivist. Moreover, the opinion fails to offer an alternate theory, or indeed any explanation, of how its conclusion that the Archivist is obliged to accept Mr. Nixon's claims can be reconciled with the regulations as now written.

It is a settled principle of administrative law that agencies are bound to follow their own regulations. See, e.g., Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); Morton v. Ruiz, 415 U.S. 199, 235 (1974); Local 1219, American Federation of Government Employees v. Donovan, 683 F.2d 511, 515-516 (D.C. Cir. 1982). Even if one accepts that the Archivist could have adopted a policy of deferring to all executive privilege claims asserted by Mr. Nixon, clearly he has not done so in these regulations. In our view, therefore, the Archivist is not free

under the current regulations to adopt the OLC opinion's approach to the treatment of executive privilege claims by Mr. Nixon. In any event, as discussed in response to question 7, we conclude that the approach advocated by OLC is inconsistent with the Archivist's statutory responsibilities and thus cannot be adopted by him.

QUESTION 3: How does the OLC opinion compare with practice and law regarding the handling of the presidential materials of other Administrations, particularly with regard to executive privilege claims?

ANSWER: Prior to enactment of the Presidential Records Act of 1978, presidential materials were regarded as the personal property of a former President. Former Presidents could dictate the terms and conditions governing access to their materials, thereby exercising control over potential executive privilege matters equivalent to that accorded former President Nixon by the OLC opinion.

The Presidential Records Act of 1978, which will first apply to the materials of President Reagan, makes significant changes in the past practice. The Act will enable a former President to exercise control over public access to materials within the scope of executive privilege for up to 12 years. Thereafter, the former President generally would have to bring suit to restrict public access to his presidential materials on grounds of executive privilege. Essentially, the Presidential Records Act will afford future ex-Presidents less control over executive privilege claims than the OLC opinion would grant Mr. Nixon in two ways. First, a former President's control period under the Act is limited to 12 years. There appears to be no time limit on Mr. Nixon's right to control the Archivist's disposition of his executive privilege claims under the OLC opinion. Second, even within the Act's 12-year control period, the Archivist, rather than the former President, is to make an initial administrative determination on whether particular documents are within the scope of executive privilege. By contrast, the OLC opinion requires the Archivist to accept Mr. Nixon's executive privilege claims even if the Archivist believes that the documents in question are not subject to the privilege.

ANALYSIS: As GSA pointed out in its initial report to Congress under section 104(a) of the 1974 Act, all materials generated and received by a President traditionally have been

treated as his own property, to do with as he wished. Thus, the former Presidents, their heirs or representatives "exerted sole and direct control over the preservation or destruction, release or restriction, location, and use of their Presidential materials."[4/] Nevertheless, the consistent practice going back to Franklin Roosevelt has been for former Presidents to donate their papers to the Government under terms which permit the papers to be made public subject to certain restrictions. As described in the GSA report, the restrictions on public access imposed by these former Presidents have been fairly consistent and are generally similar to the restriction categories in the regulations dealing with Mr. Nixon's materials.[5/] The same observations apply in the case of former Presidents Ford and Carter. The donation agreement of former President Carter, dated January 31, 1981, is illustrative. It recites, at page 2, that:

> "This conveyance does not affect the rights or obligations that I may have as President or former President, or that a President in office may have, to assert and enforce any applicable privilege in respect to confidential portions of the material conveyed."

The Carter agreement contains restrictions on public access, including a restriction on--

> "Confidential communications requesting or submitting advice between the President and his advisers or between such advisers, whether or not such advisers hold or held an official position with the Federal government, as well as any other confidential communications made by or to the President." Annex at page 3.

The restrictions on public access in former President Carter's agreement generally expire on January 20, 2001, or one year after his death, whichever is later. Annex at page 4. Former President Ford's donation agreement, dated

---

4/ General Services Administration, Report to Congress on Title I, Presidential Recordings and Materials Preservation Act, P.L. 93-526 (March 1975) (hereafter GSA Report), at page 1.

5/ GSA Report at C-1 and C-2.

December 13, 1976, contains provisions almost identical to those of the Carter agreement. The restrictions on public access in the Ford agreement generally do not extend beyond January 20, 1990.

Since the former Presidents exercised control over their materials, they did not need to assert executive privilege in order to restrict public access. Rather, a general restriction against release of "confidential communications," such as the one contained in the Carter agreement, was effective for this purpose. See in this regard, 44 U.S.C. § 2111 and 2112(c) (1982). Moreover, the former President could control application of such a general restriction to particular documents. The GSA Report notes that several former Presidents established review or screening committees to perform this function.6/ In sum, former Presidents exercised essentially the same plenary control over the administrative disposition of potential "executive privilege" claims as the OLC opinion would provide for Mr. Nixon.

The Presidential Records Act of 1978, Public Law 95-591, 92 Stat. 2523 (November 4, 1978), made fundamental changes in the future treatment of presidential materials, to be effective for the materials of the Reagan Presidency. See Public Law No. 95-591, § 3, 92 Stat. 2528. This Act added a new chapter 22 to title 44, United States Code (1982). It provides that the United States shall retain complete ownership, possession, and control of presidential records. 44 U.S.C. § 2202. Upon the conclusion of a President's last term of office the Archivist is to assume responsibility for the custody, control, preservation of, and access to such presidential records. 44 U.S.C. § 2203(f)(1). The Archivist is under an affirmative duty to make such records available to the public as rapidly and completely as possible, consistent with the other provisions of the Act. Id.

Under 44 U.S.C. § 2204, the outgoing President can specify a time period, not to exceed 12 years, during which access may be restricted for certain categories of information, including "confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers * * *." The Archivist must honor

---

6/ GSA Report at page B-5.

such restrictions until the earliest of the following events: the former President waives the restriction; the restriction period specified by the former President expires; or upon a determination by the Archivist that a record has been placed in the public domain through publication by the former President or his agents. 44 U.S.C. § 2204(b)(1). During the restriction period, the Archivist is to determine, after consultation with the former President, whether a particular record or portion thereof qualifies for restriction. 44 U.S.C. § 2204(b)(3). Under 44 U.S.C. § 2204(e), a former President may seek judicial review of a determination by the Archivist that he believes violates his rights or privileges.

Once the restriction period no longer applies, presidential records are subject to disclosure under the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982), except that the "deliberative process" exemption from disclosure in 5 U.S.C. § 552(b)(5) does not apply. See 44 U.S.C. § 2204(c)(1). The Presidential Records Act thus allows for a period of up to 12 years in which a former President may restrict his records on what would amount to executive privilege grounds. The congressional intent is that once this period expires, a former President could only pursue an executive privilege claim through a judicial action initiated to prevent disclosure. See 124 Cong. Rec. 36844 (1978) (remarks of Senator Percy).

As indicated above, the Presidential Records Act provides for considerable administrative deference with respect to executive privilege claims by future ex-Presidents, but only for a period of up to 12 years. After expiration of this period, the only statutory mechanism for restricting access to presidential materials is a determination by the Archivist to withhold certain records under the FOIA. Since the deliberative process exemption does not apply, denial of an FOIA request could not be based on a generalized interest in preserving the confidentiality of presidential communications. Executive privilege claims could still be asserted in two nonstatutory ways. The former President could bring suit against the Archivist alleging a violation of his constitutional right of executive privilege. Also, the legislative history of the Act indicates a recognition that the incumbent President could assert a constitutionally based executive privilege claim over the records of a former President. See 124 Cong. Rec. 34895 (1978) (remarks of Representative Preyer).

The Presidential Records Act thus affords a future ex-President much less deference in terms of a time-line than the open-ended period of deference the OLC opinion would afford to Mr. Nixon. Also, unlike the approach taken in the OLC opinion, the Presidential Records Act does not accord absolute deference to a former President even within the period of restricted access. Instead, the Archivist is to make a formal administrative determination (subject to judicial challenge by the former President) on whether particular records fit a restricted category. For example, the Archivist could review and decide whether certain records qualify as confidential communications under 44 U.S.C. § 2204(a)(5), or whether a former President has waived the restriction by his own use of a record, as provided in 44 U.S.C. § 2204(b)(1)(B).

QUESTION 4: Under the OLC opinion, Mr. Nixon's claims of executive privilege with regard to materials about to be made available to the public are not subject to review by the Archivist. What would happen if such a claim were to be made? Could the Archivist challenge the claim in court? Could anyone else? What is the Archivist's role in reviewing presidential papers as contemplated by the opinion?

ANSWER: Under the OLC opinion, the Archivist has no review role once Mr. Nixon has asserted a claim of executive privilege; he could not challenge Mr. Nixon's claim administratively or in court. A party seeking access to materials in connection with a pending judicial proceeding could challenge Mr. Nixon's claim in that proceeding. While it is less clear that a party seeking access for general purposes could challenge such a claim, there probably would be some judicial recourse.

ANALYSIS: The OLC opinion, as we read it, does not affect the Archivist's review process up to the point at which notice is given of the proposed opening to public access of an integral file segment of the Nixon materials. However, should Mr. Nixon respond to the notice by asserting executive privilege with regard to any or all of the documents contained in the file segment, the Archivist has no role left except to assure continued withholding of the documents from public access. Thus, under the approach taken in the OLC opinion, an assertion of executive privilege by Mr. Nixon effectively creates a new category of restricted materials similar to the

categories specified in sections 1275.50(a) and 1275.52(b) of the regulations. The OLC opinion clearly means to preclude the Archivist from mounting any challenge to a claim of executive privilege in any forum. Other parties, however, may be able to contest a claim of executive privilege by Mr. Nixon as discussed below.

It seems clear that executive privilege claims could be challenged by parties seeking to obtain Nixon presidential materials under the so-called "special access" provision of the 1974 Act. This provision, contained in section 102(b), makes the Nixon materials available, subject to any rights, defenses or claims of privilege, "for use in any judicial proceeding or otherwise subject to court subpena or other legal process."7/ Presumably the forum for such a challenge would be the pending judicial proceeding for which special access was sought.

It is less clear what judicial review would be available to parties seeking access for historical research or a generalized interest in disclosure. It appears that most materials potentially subject to executive privilege claims would not be Federal agency records subject to disclosure under the FOIA. Cf., Ricchio v. Kline, 773 F.2d 1389 (D.C. Cir. 1985), and section 1275.70 of the Archivist's regulations. The Ricchio court affirmed the dismissal of an FOIA action seeking access to transcripts of the Nixon tapes, holding:

> "In the Materials Act [the 1974 Act] Congress provided a comprehensive, carefully tailored and detailed procedure designed to protect both the interest of the public in obtaining disclosure of President Nixon's papers and of President Nixon in protecting the confidentiality of Presidential conversations and deliberations. * * * We conclude that the proper method by which the appellant

---

7/ The GSA had issued special access regulations to implement section 102(b). See our response to question 6 for a discussion of prior special access cases under these regulations. Such access would now be covered by section 1275.34 of the Archivist's current regulations.

> Ricchio may seek disclosure of the Watergate Force transcripts of the Nixon tapes is by proceeding under the Materials Act and that she cannot proceed under the [Freedom of] Information Act." 773 F.2d at 1395.

Thus, while the language of section 105(a) of the Act does not expressly grant jurisdiction for this purpose, it might prove broad enough to accommodate an action by a private individual seeking access to the Nixon materials. In the alternative, it is possible that a party seeking access to Nixon materials over a claim of executive privilege might appeal the Archivist's refusal to make such records available under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1982). See in this regard, American Friends Service Committee v. Webster, 720 F.2d 29 (D.C. Cir. 1983).

In sum, it seems to us likely that a party seeking access to Nixon materials could bring suit to challenge a claim of executive privilege. At the same time, it is uncertain precisely what the forum would be or what standard of review would apply.

QUESTION 5: The OLC opinion seems to contend that an incumbent president may assert a claim of executive privilege with respect to the Nixon materials. Is there any precedent for such a claim?

ANSWER: While an incumbent President would have the constitutional right to assert a claim of executive privilege with respect to the Nixon materials, it is our understanding that this has never happened in the almost 12 years since Mr. Nixon left office.

QUESTION 6: The Archivist's regulations comprise the sixth set of public access regulations under the 1974 Act. This particular set was published as proposed regulations on March 29, 1985. At what points in the tortuous history of the promulgation of these regulations has the Archives, the Justice Department or OMB taken the position that Mr. Nixon or a successor President could make a claim of executive privilege covering these materials that could not be reviewed by the Archivist? At what points have the Archives, the Justice Department or OMB taken the opposite position? Has either Justice or OMB previously questioned the basic structure of the regulations?

ANSWER: It is our understanding that the 1986 OLC opinion represents the first instance in which any agency or party has taken the position that Mr. Nixon or a successor President could make a claim of executive privilege that could not be reviewed by the Archivist. The GSA and the Archives have consistently taken the opposite position with reference to such claims by Mr. Nixon, at times with the support of the Justice Department. As far as we can determine, OMB has never previously taken a position on this issue or on any issue relating to the basic structure of the regulations. The Justice Department at various times has raised questions about particular provisions of the regulations but has never before questioned their basic structure.

ANALYSIS: The first set of proposed regulations under the 1974 Act, submitted by GSA to Congress in March 1975, adopted the basic approach that the Archivist (or at that time the Administrator of GSA) would review and make final administrative determinations concerning executive privilege claims. The GSA Report states, at page B-1:

> "Under this Act, the Government, rather than a former President, his heirs or close associates, will make decisions regarding access to a President's materials. This fact, coupled with the need to make available the full truth about Watergate, makes the establishment of an objective system for reviewing these materials of primary importance."

The initial regulations provided that no integral file segment would be processed and opened for public access until 90 days following the effective date of the regulations. During this 90-day period the GSA Administrator would receive, evaluate and decide claims of privilege. The GSA Report, at pages G-31 and 32, describes this provision of the regulations as follows:

> "* * * this provision reflects an administrative procedure in which the Administrator is committed to an affirmative role in considering and rendering the final administrative determination on the claim. Upon receipt of a claim, the Administrator will require the immediate segregation and examination of the specified materials so that he might consult

> with other Federal agencies, including the Department of Justice, to evaluate the legal validity of the claim. The Administrator will then notify the claimant of his decision, which is the final administrative determination on the claim.
>
> "When that determination is adverse to the claimant, the Administrator will prohibit public access to the pertinent materials for at least 30 days from the claimant's receipt of the Administrator's decision. During this period, the claimant has an opportunity to pursue whatever additional remedies, presumably judicial review, that may be available to prevent public access before his alleged right or privilege is violated. Absent judicial restraint, pertinent materials that have been processed will be open for public access at the end of the 30-day period."

While the subsequent versions of the regulations have differed in some respects, all are consistent with the basic approach reflected in the March 1975 version under which executive privilege claims would be reviewed and decided administratively.

Moreover, the Archivist has on several occasions made administrative decisions concerning claims of executive privilege asserted by former President Nixon in the context of "special access" cases where the Nixon materials were sought in connection with pending litigation. We have reviewed records pertaining to three such cases during the period 1978 to 1983 in which the Archivist conducted detailed research and evaluations in response to claims of executive privilege asserted by Mr. Nixon with respect to many documents for which discovery was sought. Mr. Nixon's claims of executive privilege were sustained in some instances but were rejected in many others.

In the first two cases, considered by the Archivist in 1978 and 1979,[8] Mr. Nixon asserted executive privilege with respect to 41 documents.[9] The Archivist accepted Mr. Nixon's claim for 12 documents and rejected his claim for 21 documents. His claims as to the remaining 8 documents were accepted in part and rejected in part. The Archivist generally upheld Mr. Nixon's claim of executive privilege where the documents involved confidential communications reflecting advice to the President and had not been subject to prior disclosure. In those cases where executive privilege was rejected, this was almost always because the Archivist determined that the documents or portions thereof involved only factual information; had already been released by Federal agencies pursuant to the FOIA; had been discussed and quoted in congressional hearings and reports; or had already been the subject of judicial rulings denying a claim of privilege by the Government.

In the third case,[10] considered in 1983, the Archivist rejected all of Mr. Nixon's executive privilege claims, which covered approximately 270 documents. In a letter to Mr. Nixon's attorney dated August 11, 1983, the Archivist

---

8/ The litigation involved was A. Ernest Fitzgerald v. Alexander P. Butterfield, et al., Civ. No. 74-178, U.S.D.C. D.D.C., and Cities Services Helix, Inc. v. United States, and National Helium Corp. v. United States, Nos. 138-75 and 158-75, Ct. Cl.

9/ This figure and the following figures include only documents as to which Mr. Nixon opposed disclosure based at least in part on executive privilege. He objected to disclosure of additional documents on other grounds. Also, the figures may include some duplication due to the same documents appearing in more than one file.

10/ This case involved litigation identified only as Barr v. Palmby and Williams v. Continental Grain Co., which apparently concerned the so-called "Russian grain deal." We understand that the litigation was settled before production of any of the Nixon materials was required.

noted that he had been "provided very little in the way of justification or rationale as to why the claim [of executive privilege] should be accepted for all the documents at issue." The Archivist went on to point out, among other things, that many of the documents were widely available and whatever need for confidentiality may once have existed had eroded over time. He concluded, in summary, that "the argument for disclosure is easily preponderant in the present case."

It is our understanding that the Archivist consulted with the Justice Department in the cases discussed above and that Justice supported the approach taken by the Archivist with respect to the executive privilege determinations.

QUESTION 7: How does the OLC opinion comport with congressional intent that the 1974 Act "provide the public with the 'full truth,' at the earliest reasonable date, of the abuses of govenmental power" of the Watergate period? (See S. Rept. 94-368, 121 Cong. Rec. 28610 (1975).)

ANSWER: We do not believe that the OLC opinion can be reconciled with the congressional intent underlying the 1974 Act or, indeed, with the Archivist's responsibilities under the terms of that Act. In our view, the rationale of the opinion also suggests that OLC may not allow the Archivist to carry out fully his responsibilities under the Presidential Records Act of 1978.

ANALYSIS: OLC contends that the Archivist's duty when confronted with an executive privilege claim by Mr. Nixon must be analyzed in terms of how an incumbent President should respond to such a claim by a former President. It concludes that, generally, the incumbent President should accept the claim without challenge even if he does not believe that executive privilege applies. Therefore, the Archivist likewise must accept any executive privilege claim asserted by Mr. Nixon.

We believe that this analytical framework is fundamentally wrong. The Archivist does not stand in the shoes of the incumbent President in responding to Mr. Nixon's claims, nor does he operate in a vacuum. Instead, he must address such claims as an officer of the United States charged with specific statutory responsibilities as defined by the mandates of the 1974 Act. This, of course, requires consideration of not

just the need to protect Mr. Nixon's opportunity to assert executive privilege, but also the needs specified in section 104(a)(1) and (6) of the Act "to provide the public with the full truth * * * of * * * 'Watergate'" and "to provide public access to those materials which have general historical significance * * *."

The OLC opinion cannot withstand scrutiny in this context. We do not understand how the opinion's rule of automatic deference to any claim of executive privilege is required to protect Mr. Nixon's "opportunity to assert" such a claim--which is all the statute requires--even if this statutory need is viewed in isolation. The approach taken in the regulations of withholding disclosure of documents for which the Archivist rejects such a claim in order to enable Mr. Nixon to obtain judicial review seems to meet this need fully. Moreover, the OLC opinion does not seek in any way to accommodate the public access needs that are also specified in the statute.

The lack of any effort to balance the competing needs in the statute is most clearly illustrated by the opinion's assertion that the Archivist must accept a claim of privilege by Mr. Nixon even if he "does not believe that the documents fall within the scope of the privilege." This is patently inconsistent with the statute and could seriously undercut its operation. While evaluation of executive privilege claims can be a difficult task, there are some standards to apply. In Nixon v. Administrator, the Court reaffirmed that the scope of the privilege is "limited to communications 'in performance of [a President's] responsibilities * * * of his office' * * * and made 'in the process of shaping policies and making decisions' * * *." 425 U.S. at 449. The Court also noted that "[t]he expectation of the confidentiality of executive communications * * * has always been limited and subject to erosion over time after an administration leaves office." Id. at 451.

The statute envisions that the Archivist will apply the expertise of his office to research and evaluate the Nixon materials from these perspectives. This is precisely what the regulations contemplate and, as discussed in response to question 6, what the Archivist has done with respect to Mr. Nixon's past executive privilege claims. The Archivist has sustained some of these claims, particularly in the years shortly after Mr. Nixon left office. However, he has also

rejected many, including numerous claims asserted over documents which clearly did not fall within the scope of the privilege. The OLC opinion would put an end to this process.

Finally, we believe that the OLC opinion on the Nixon materials does not bode well for implementation of the Presidential Records Act of 1978 with reference to the materials of future ex-Presidents. The foundation for the OLC opinion's approach to the Archivist's duties under the 1974 Act is its conclusion that an incumbent President "should" defer to a former President's claim of executive privilege. It is notable that OLC does not base this view on any constitutional or statutory mandate. Instead, this seems to be essentially a statement of OLC's policy view on how executive privilege claims asserted by former Presidents should be handled.

The OLC opinion finds this view to be "strongly indicate[d]" by the Supreme Court's conclusion and reasoning in Nixon v. Administrator. As discussed in more detail previously,[11/] the OLC opinion notes that a former President's privilege would be of little value if it were dependent on ratification by the incumbent, who might not be sensitive to the need to protect the confidentiality of the former President's communications or who might even be antagonistic to the former President and seek political advantage in the disclosure of his communications. We agree that these considerations underlie the Supreme Court's conclusion in Nixon v. Administrator that a former President must be granted a right to assert executive privilege independent of the incumbent President. However, these considerations do not support the conclusion that the incumbent should defer to claims of privilege asserted by his predecessors where the incumbent does not believe that the claim of privilege is well founded. On the contrary, the Court in Nixon v. Administrator noted that Presidents Ford and Carter did not support Mr. Nixon's executive privilege claim as to the 1974 Act, and observed that their lack of support detracted from the weight of Mr. Nixon's claim because--

> "* * * it must be presumed that the incumbent President is vitally concerned with and in the best position to assess the

---

11/ See pages 7-8, supra.

> present and future needs of the Executive Branch, and to support invocation of the privilege accordingly." 433 U.S. at 449.

Therefore, we read Nixon v. Administrator as indicating that the incumbent President should exercise his own judgment, supporting a former President's claim of privilege only if he considers it to be justified. Clearly, lack of support by the incumbent President does not, under the rule of Nixon v. Administrator, prevent the former President from pursuing his claim in the courts.

In any event, we do not understand OLC's willingness to impose its viewpoint on the Archivist virtually without regard to the statutory framework in which the Archivist must address executive privilege claims and, by its own admission, without regard to the merits of the claim. In effect, the OLC opinion treats executive privilege as a concept which knows no temporal limits and is subject to review and evaluation only by the courts.

We see no reason to believe that OLC would depart from this approach in advising the Archivist on how to carry out his functions under the Presidential Records Act. As noted previously, this Act requires the Archivist to determine the applicability of confidentiality restrictions to particular documents even within the initial restriction period. Once the restriction period has expired--not later than 12 years after a President leaves office--the Act virtually requires the Archivist to reject (subject to possible judicial challenge on constitutional grounds) executive privilege claims which are based only on a generalized interest in the confidentiality of presidential communications. The Archivist could not carry out either of these responsibilities if constrained by the rule established in the OLC opinion in this case.

QUESTION 9: Were there any communications between Mr. Nixon, his agents or his former subordinates and the Archives, OMB or the Justice Department with regard to the final regulations?

ANSWER: The Archives received formal written comments in response to its proposed rulemaking from an attorney representing Mr. Nixon and an attorney representing Dr. Henry Kissinger. From the information available to us it

appears that there were no other direct communications on the regulations between Mr. Nixon, his agents or his former subordinates and the Archives, OMB or OLC. However, it has been reported in the press that Mr. Nixon's attorneys met with Justice Department officials outside of OLC and that these officials later met with Mr. Cooper of OLC.